

8-1-1985

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Recommended Citation

Maria C. Holland, *Judicial Review of Compliance with the National Environmental Policy Act: An Opportunity for the Rule of Reason*, 12 B.C. Env'tl. Aff. L. Rev. 743 (1985),
<http://lawdigitalcommons.bc.edu/ealr/vol12/iss4/4>

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JUDICIAL REVIEW OF COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT: AN OPPORTUNITY FOR THE RULE OF REASON

Maria C. Holland*

I. INTRODUCTION

The National Environmental Policy Act of 1969¹ (NEPA) provides federal administrative agencies² with a framework within which to consider the environmental consequences of their actions. Under NEPA, a federal agency must prepare and submit an Environmental Impact Statement (EIS) prior to the initiation of any action which could have a significant effect on the environment.³ NEPA establishes a national policy "to promote efforts which will prevent or eliminate damage to the environment."⁴ Litigation brought to enforce the procedural scheme delineated in the Act⁵ has shaped the form of compliance with this environmental protection policy.⁶ While the statute's policy language is

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¹ The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1976 & Supp. V 1981); (This statute was the first act signed into law in the decade of 1970's: President Richard M. Nixon signed the act to become effective January 1, 1970) [hereinafter referenced as NEPA].

² Many states have also adopted statutes similar to NEPA announcing a comprehensive environmental policy. NEPA, however, basically addresses federal agency actions, since private actions are necessarily limited by federal license and permit prescriptions. See Yost, 27 C.P.S. (BNA) *The Environmental Impact Statement Process*, Worksheet 9. (A synopsis of the existing state Environmental Impact Statement requirements.)

³ 42 U.S.C. § 4332(2)(c) (1976).

⁴ 42 U.S.C. § 4221 (1976).

⁵ 42 U.S.C. § 4332(2)(c) (1976) (The procedural requirement is the federal agency submission of an Environmental Impact Statement ("EIS"). The EIS is the action-forcing procedural mechanism specified in the Act which requires federal agencies to prepare an analytical statement of the environmental consequences of their proposed federal action.). See *infra* text and notes at notes 223-353.

⁶ J. HAGERTY AND J. HEER, ENVIRONMENTAL ASSESSMENTS AND STATEMENTS (1977) §§ 3-6 [hereinafter cited as ASSESSMENTS AND STATEMENTS] (This work provides a good

broad,⁷ the Act designates specific procedural requirements for agencies to follow in their decision-making process.⁸ Through implementing NEPA, federal agencies have reached various and often contradictory results. Consequently, courts have been delegated a substantial role in assessing the actual impact of the Act's substance and procedure upon federal agency conduct.

Since the enactment of NEPA fourteen years ago, judicial interpretation of the statute has shaped the impact of the Act. The first decade of NEPA litigation focused primarily, although not exclusively, upon agency responsibilities under the Act.⁹ In recent years, however, litigation under NEPA has focused more upon the nature and scope of the judiciary's role in enforcing NEPA and its relation to the administration agencies.¹⁰ The statute's loosely drafted language has produced a variety of judicial interpretations. As a result, federal agencies have encountered problems complying with the judicially-construed mandates of NEPA.

NEPA was created by the Congress as a "basic national charter for protection of the environment."¹¹ The general purpose of the Act is to provide for the assurance of a "safe, healthful, productive and aesthetically and culturally pleasing"¹² environment for all Americans. The federal government is assigned the responsibility of implementing this policy goal.¹³ To accomplish this goal, NEPA charges federal agencies¹⁴ with the duty of observing certain

overview of NEPA's legislative history and the integration of the judicial role necessary to the Act's implementation); L. LAKE, *ENVIRONMENTAL REGULATION*, ch. 6 (1982); M. BAKER, J. KAMING, R. MORRISON, *Environmental Impact Statements: A Guide to Preparation and Review* (PRACTICING LAW INSTITUTE 1977) [hereinafter cited as *Baker, EIS Guide*].

⁷ *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (This seminal case was the first judicial interpretation of NEPA by the D.C. Circuit. In his opening statement, J. Skelly Wright predicted the onslaught of litigation regarding environmental protection and ruled that agency rules governing consideration of environmental matters were to be held to a "strict standard of compliance"). *Id.* See also *ASSESSMENTS AND STATEMENTS*, *supra* note 6, at 91; *Baker, EIS GUIDE* *supra* note 6, at 18.

⁸ 449 F.2d at 1112.

⁹ See *Vermont Yankee Nuclear Power Group v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (NEPA mandate to agencies "essentially procedural").

¹⁰ See L. LAKE, *ENVIRONMENTAL REGULATION* (1982) 95; *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068 (1st Cir. 1980).

¹¹ 40 C.F.R. § 1500.1 (1983).

¹² 42 U.S.C. § 4331(b)(2) (1976).

¹³ 42 U.S.C. § 4331(b) (1976).

¹⁴ Federal agencies, as representatives of specified standard of federal government

procedural requirements in the course of making agency decisions.¹⁵ Failure by federal agencies to "use all means practicable"¹⁶ to attain the goals of NEPA is redressable by those adversely affected through injunctive relief.¹⁷ Public enforcement of the federal agencies' duty of compliance with the statute is a method of ensuring that the statute's policy will be realized in a manner beneficial to the American public.

The sweeping nature of NEPA's policy statement has required¹⁸ that its ramifications be developed through decisional law.¹⁹ Such broad statutory language essentially provides "a catalyst for development of a 'common law' of NEPA."²⁰ Some courts have adopted this interpretation of the Act in construing the provisions of NEPA,²¹ contributing to the development of the statute as an effective environmental protection tool. While this "common law of NEPA" has furnished federal administrative agencies with some standards for compliance, it has yet to supply the judiciary with a uniform standard or methodology of reviewing agency compliance with the Act.

Federal courts have applied a variety of tests for assessing agency implementation of the Act's policies.²² Contributing to the confusion regarding the appropriate standard of judicial review is the inconsistency with which federal agencies have observed the procedural requirements of the Act. Without a coherent judicial definition of criteria for compliance with NEPA, agencies have been unable to develop a process of decision making which comports with the environmental mandates of the Act. Lacking uniformity, federal agencies' implementation of a national environmental policy will never be substantively achieved.

are, therefore, required to exercise a responsibility as they specifically devise and implement projects which directly affect the environment.

¹⁵ 42 U.S.C. § 4332(2) (1976).

¹⁶ 42 U.S.C. § 4331(b) (1976).

¹⁷ See 1982 ENVIRONMENTAL QUALITY: 13TH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1983) 234. According to statistics issued by the Council on Environmental Quality (hereinafter cited as CEQ), there were 1,191 lawsuits against federal agencies based upon NEPA claims in the period between January 1, 1970 and December 31, 1979.

¹⁸ 42 U.S.C. § 4331(a) (1976).

¹⁹ ASSESSMENTS AND STATEMENTS *supra* note 6, at 93.

²⁰ *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., dissenting in part).

²¹ See *Sierra Club v. Sigler*, 695 F.2d 957, 965 (5th Cir. 1983); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1149 (D. Alaska, 1983).

²² See *LAKE*, *supra* note at 104 (Lake suggests the discrepancy in review standards applied by the judiciary is rooted in the controversy about whether NEPA is a substantive or procedural mandate).

Federal courts may be able to develop a consistent standard of judicial review by analogizing the provisions of NEPA to the common law concept of a charitable trust.²³ A charitable trust is a fiduciary relationship²⁴ established to provide a benefit to the community or a class of individuals rather than to an individual beneficiary.²⁵ A comparison between NEPA and such a trust reveals similarities which could provide the judiciary with a comparative framework by which to analyze NEPA.

Administration of the charitable trust is the duty owed by the trustee²⁶ to a designated class of beneficiaries. The trustee must exercise this responsibility in order to effectuate the trust purpose.²⁷ Duties of the trustee include the exercise of reasonable care and skill²⁸ in the control²⁹ and the preservation³⁰ of the trust property. In order to fulfill his obligation to the beneficiaries of the trust, the trustee must record and present to those beneficiaries an account of the trust administration.³¹ This principle of accounting is designed to provide an accurate and current reflection of the trust property status. Upon failure of the trustee to perform these duties, the trust may be enforced in equity³² by someone with a special interest in the trust or by a public officer.³³ The provisions of NEPA are analogous to a charitable trust established to preserve the integrity of the American environment for the "succeeding generations"³⁴ of American citizens.

Several courts have held that agency compliance with NEPA should be governed by the "rule of reason."³⁵ Analogizing to this

²³ See *infra* text and notes at notes 46-123.

²⁴ RESTATEMENT (SECOND) OF TRUSTS, § 348 (1959) [hereinafter cited as RESTATEMENT].

²⁵ *Id.* at § 364.

²⁶ *Id.* at § 379.

²⁷ *Id.* at § 379 comment a; see also § 170.

²⁸ *Id.* at § 379 comment a.

²⁹ *Id.* at § 175.

³⁰ *Id.* at § 176.

³¹ *Id.* at § 379; see also § 172.

³² *Id.* at § 392.

³³ *Id.* at § 391.

³⁴ 42 U.S.C. § 4331(b)(1) (1976).

³⁵ 449 F.2d at 112; *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *International Harvester Co., Inc. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973); see also Leventhal, *Environmental Decision-Making and the Role of the Courts*, 122 U. PA. L. REV. 509, 537-40 (1975). He suggests that the "rule of reason" should govern agency activity pursuant to NEPA. This standard is a stricter requirement for agency behavior than is that imposed by the Administrative Procedure Act which requires only that agency behavior adhere to a standard which is not "arbitrary and capricious." 5 U.S.C. § 706(a) (1976).

charitable trust principle supports judicial application of a reasonableness standard to review agency decision making under the statute. Under this analogy, the duties imposed upon federal agencies to protect the national environment are similar to the fiduciary duties of a trustee.³⁶ NEPA imposes duties on federal agencies to account publicly for administrative decisions affecting the environment, much as a trustee must observe his duties of accounting to the beneficiaries of the trust.³⁷ Using this analogy, the judiciary is provided with an ascertainable standard by which to assess agency conduct. In addition, this analogy to the trustee's accounting duties allows courts to use the statute's delineated accounting procedure — such as its consideration of alternative proposals — as a source for proper reflection of agency compliance with the Act. A common law interpretation of NEPA consistent with the Act's stated environmental policy is therefore possible through the use of the charitable trust analogy.³⁸

The environmental policy and procedural requirements of NEPA can be considered as parallel to the nature of a charitable trust instrument. A charitable trust allows a trustee to manage the trust property for a purpose beneficial to the public.³⁹ NEPA creates a similar obligation for federal agencies. Congress imposed upon the federal government, through its federal agencies, the duty of promoting "efforts which will prevent or eliminate damage to the environment."⁴⁰ To achieve this goal, the trustees must be held to the high standard of conduct arising from the fiduciary relationship between the trustee and the trust beneficiaries.⁴¹ Viewing the agency decision-making process from this perspective would permit the judiciary to scrutinize agency compliance with NEPA more closely. Through analogy to the trust principle the courts could analyze agency compliance with the Act by applying a consistent "reasonableness" standard.

The problems inherent in judicial interpretation of NEPA are revealed in the review of the alternatives requirement of the EIS.⁴² The EIS is the accounting procedure presented in the Act.

³⁶ See *infra* text and notes at notes 90-115.

³⁷ See *infra* text and notes at notes 107-15.

³⁸ See *infra* text and notes at notes 46-123.

³⁹ *Supra* note 24, at § 348.

⁴⁰ 42 U.S.C. § 4321 (1976).

⁴¹ *Supra* note 24, at § 2 comment b, § 170; A.W. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS §§ 2.5, 170 (1960) [hereinafter cited as SCOTT].

⁴² 42 U.S.C. § 4332(2)(c)(iii) (1976).

One of its purposes is to reflect agency discussion of the alternatives explored by the agency in its decision-making process.⁴³ However, varying judicial interpretations of this requirement have generated different standards of judicial review as well as an incoherent standard for agency performance.⁴⁴ Achievement of NEPA's fundamental policies will be more readily accomplished if the judicial role is performed in a consistent manner — possible through this analogy to the charitable trust. As one court commented: "NEPA thus provides a means by which the ultimate owners of the land — the citizens — may inform their trustee — the government — of their approval or disapproval of the proposed actions."⁴⁵

This Article will outline the basic trust principles and the statutory elements relevant to the analogy of the charitable trust doctrine. It will then examine the possibility of resolving the inconsistency of judicial perspective of NEPA through this analogy. Section II encapsulates the policy and components of the charitable trust doctrine. Section III then presents NEPA's policy and its mandate to the agencies as interpreted by the judiciary. The Article then addresses the EIS as the statute's "action-forcing" mechanism, and explores many parallels to the charitable trust doctrine. Fourth, a specific EIS requirement—that federal agencies consider alternatives—will be examined against a backdrop of judicial inconsistency. This Article will then propose changes in the statutory framework of NEPA which could enable the disparity to be resolved. This Article will conclude that the courts have the authority to demand more than *pro forma* compliance with NEPA. Applying principles of the common law charitable trust doctrine to the statute would infuse NEPA with the vitality and force necessary to the accomplishment of the NEPA environmental policy goal.

II. PRINCIPLES OF THE CHARITABLE TRUST DOCTRINE

The trust is a "fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another."⁴⁶ It is a legal

⁴³ *Id.*

⁴⁴ See e.g., discussion *infra* at text and notes at notes 258-65.

⁴⁵ *California v. Bergland*, 13 ERC 2225 (1975).

⁴⁶ REST., *supra* note 24, at § 2.

relationship created at common law to effectuate various methods of property disposition.⁴⁷ As a flexible⁴⁸ legal device, the trust is governed by equitable principles⁴⁹ and has few specific legal constraints. Certain specific elements must be present before a disposition of property qualifies as a trust: there must be a trust property,⁵⁰ a trustee⁵¹, and a beneficiary.⁵²

The trust is created with the specific intent that a trust relationship arise.⁵³ Creation of the trust originates with a "settlor"⁵⁴ who manifests an intent to develop a trust and satisfies the requisite formalities in the creation process.⁵⁵ These formalities include designation of the trust elements, a description of the trust property, the appointment of a trustee to administer the trust, and the designation of the beneficiaries of the trust.⁵⁶ The trust relationship permits the owner of property to alienate the benefits of ownership from the burdens associated with such a possessory interest.⁵⁷ This is accomplished through the mechanism of trustee management of the corpus. The corpus is managed to achieve the trust purpose as it affects the beneficiary.⁵⁸ Service of the beneficiaries' interest in the trust property remains the constant duty of the trustee.⁵⁹ Settlor articulation of the trust goal is necessary to provide guidance for the trustee. The trustee must have some evidence as to what is required to properly administer and achieve the trust.⁶⁰ A clear understanding of the settlor's intent is necessary to permit the trustee to effect the purpose of the trust.

⁴⁷ *Id.* at § 2 comment c.

⁴⁸ SCOTT, *supra* note 41, at § 2.2.

⁴⁹ REST., *supra* note 24, at § 197; SCOTT, *supra* note 41, at § 12.3.

⁵⁰ REST., *supra* note 24, at § 3(2); SCOTT, *supra* note 41, at § 1.

⁵¹ REST., *supra* note 24, at § 3(3).

⁵² *Id.* at § 3(4); SCOTT, *supra* note 41, at § 3.2.

⁵³ REST., *supra* note 24, at § 23.

⁵⁴ REST., *supra* note 24, at §§ 3(1), 18. The settlor is that person or entity with legal control over and interest in the trust property and is free to determine its disposition.

⁵⁵ See generally REST., *supra* note 24, at §§ 23-52, 16B; for specific instances, see SCOTT, *supra* note 41, at § 24.2.

⁵⁶ REST., *supra* note 24, at § 76; see also SCOTT, *supra* note 41, at § 76.

⁵⁷ SCOTT, *supra* note 41, at § 1.

⁵⁸ REST., *supra* note 24, at § 164; SCOTT, *supra* note 41, at § 164.1.

⁵⁹ SCOTT, *supra* note 41, at § 348.

⁶⁰ SCOTT, *supra* note 41, at § 123(3).

A. The Charitable Trust

The charitable trust⁶¹ must be created to serve a public purpose, rather than the interest of specific individuals.⁶² A charitable purpose is generally defined as any "purpose that is beneficial to the community."⁶³ A substantial societal interest is required to qualify as a valid charitable trust purpose.⁶⁴ The Restatement (second) of Trusts takes the position that a purpose can be viewed as charitable if its attainment will be of such social value to justify the duration of property in perpetuity to this end.⁶⁵ Legitimate goals of a charitable trust include the advancement of religion,⁶⁶ the promotion of health,⁶⁷ education,⁶⁸ the relief of poverty,⁶⁹ the construction of public buildings and highways,⁷⁰ as well as conservation of natural resources.⁷¹ A trust created to benefit the nation, a state, or municipality is considered to have a charitable purpose.⁷² Improvement of the structure and methods of government also qualifies as a valid charitable purpose.⁷³ Occasionally the charitable trust has been referred to as a "governmental"⁷⁴ trust because it provides citizens with advantages more commonly supplied by national, state, or local governments.⁷⁵ Due to the amorphous nature of such governmental purposes "beneficial to

⁶¹ REST., *supra* note 24, at § 348.

⁶² SCOTT, *supra* note 41, at §§ 348.3, 364.

⁶³ Commissioners for Special Purposes of Income Tax v. Pemsell, A.C. 531, 583 (1891); REST., *supra* note 24, at § 368 comment f.

⁶⁴ REST., *supra* note 24, at § 368(f).

⁶⁵ *Id.* at § 368 comment b.

⁶⁶ *Id.* at § 368(c).

⁶⁷ *Id.* at § 368(d).

⁶⁸ *Id.* at § 368(b).

⁶⁹ *Id.* at § 368(a).

⁷⁰ SCOTT, *supra* note 41, at § 368.

⁷¹ REST., *supra* note 24, at § 374, comment f.

⁷² REST., *supra* note 24, at § 374, comment j.

⁷³ *Id.* at §§ 373-374; *see also* SCOTT, *supra* note 41, at § 368.

⁷⁴ In fact, the United States may administer a charitable trust if the purpose of such trust intertwines with the powers conferred upon the federal government by the Constitution. SCOTT, *supra* note 41, at § 378.

⁷⁵ *Id.* at §§ 365, 401. Even though the rule of perpetuities limits trust instruments to 21 years in length, a charitable trust may continue beyond this time limit. The trust may continue as long as the certain state of affairs contemplated by the settlor continues to exist.

The NEPA statute, in Section 101(b)(1) (42 U.S.C. § 4331(b)(1) (1976)) essentially recognizes the responsibility "of each generation as trustee of the environment for succeeding generations." This duty is imposed based upon an assumption that the governmental structure existing in 1970 will continue.

the community," the charitable trust may endure for an indefinite or unlimited time.⁷⁶

Consistent with the purpose, the charitable trust must be created for the benefit of a *class* of beneficiaries.⁷⁷ Individuals within that class, however, must not be designated to receive the benefit of the trust.⁷⁸ The requirement of indefinite beneficiaries within a more precisely prescribed class is designed to promote the charitable trust goal of delivering a social benefit to the public.⁷⁹ Identifying members of a certain class as the recipients of the trust profit affords the trust the opportunity to serve the interests of successive generations of this class of beneficiaries.⁸⁰

Charitable trust provisions have been liberally construed in order to allow the goals of the settlor to be fulfilled.⁸¹ No specific language is required for the formation of a charitable trust.⁸² All that is required is a manifestation of intent that the trust property be used for a certain charitable purpose and be accompanied by enforceable duties designed to achieve that purpose.⁸³ The trustee charged with administration of the charitable trust is expected to exercise reasonably the duties and powers necessary to ensure that the charitable purpose of the trust is achieved. These duties accompanying the charitable trust were once enforceable in equity⁸⁴ only by the State Attorney General as the representative of interest of the public.⁸⁵

Under modern statutory law, however, the trend has been to expand the range of persons legally capable of enforcing the purpose of the trust through injunctive relief.⁸⁶ Beneficiaries with

⁷⁶ SCOTT, *supra* note 41, at § 365.

⁷⁷ REST., *supra* note 24, at § 375.

⁷⁸ SCOTT, *supra* note 41, at § 375.2.

⁷⁹ *Id.* at § 375.

⁸⁰ *Id.*

⁸¹ First Bank & Trust Co. v. Attorney General, 371 Mass. 796, 359 N.E.2d 938 (1977).

⁸² SCOTT, *supra* note 41, at § 351.

⁸³ REST., *supra* note 24, at § 351.

⁸⁴ *Id.* at § 391.

⁸⁵ *Id.* at § 391.

⁸⁶ G.G. BOGERT AND G.T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS, (5th ed. (1973)) 401-43; *see* WISC. STAT. ANN. §§ 701-10 (West, 1971). This is analogous to the expanded theory of standing in environmental cases.

An important contributing factor to the number of cases arising under NEPA is the liberalized standing requirements in environmental suits brought under federal statutes. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Supreme Court enunciated the elements necessary to confer standing in cases brought by persons alleging injury "of a non-economic nature to interests that are widely shared." *Id.* at 734. The Court stated that the plaintiff must suffer "injury in fact" and also be within "the zone of interests to

a "special interest in the enforcement of the trust"⁸⁷ are regarded as proper plaintiffs, in addition to the Attorney General, for enforcing the terms of the trust. Thus, the beneficiaries of a charitable trust may bring suit against the trustee for any interference with his entitlement to trust benefits. In order to have standing to sue, however, a beneficiary with a "special interest" in the trust must demonstrate that his interest has been adversely affected by the trustee's inappropriate administration of the trust.⁸⁸ Allegations of damage caused to the public generally are insufficient to support a claim of standing.⁸⁹

B. Fiduciary Responsibilities of the Trustee in Administering the Trust

The trustee incurs certain duties and obligations to administer the trust on behalf of the beneficiary.⁹⁰ The extent of these duties and powers is established by the terms of the trust.⁹¹ Under both charitable and private trust law,⁹² the trustee owes a high duty of management responsibility to the beneficiary.⁹³ The trustee's obligation to exercise his discretion over the trust property to further the interests of the beneficiary is fundamental to the trust relationship.⁹⁴ A fiduciary standard of integrity must accompany the trustee's assumption of duties due to her relatively unfettered

be protected or regulated by the statute." *Id.* at 733. Once the particular plaintiff has established an interest in the outcome of the suit, she is entitled to assert the interest of the public generally. *Id.* at 740 n.15.

This expanded notion of standing in environmental cases in conjunction with the broad policy mandate of NEPA reflects a recognition of a legally enforceable public interest in the fate of the American environment. NEPA itself does not confer a grant of standing, nor does it contain a remedial scheme to enforce its substantive and procedural dictates. A broad class of citizens, however, are provided the opportunity to hold the federal government accountable for its actions affecting the environment through implementation of standing criteria announced in *Sierra Club*. See L. RODGERS, *HANDBOOK ON ENVIRONMENTAL LAW* (1977); F. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 9.126.3 (1978); Anderson, *The National Environmental Policy Act*, in *ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW*, (E.I. DOLGIN & T.G.P. GUILBERT, eds., 1974) 283-86; *Sierra Club v. Morton*, 405 U.S. 727 (1972); *United States v. SCRAP* (*SCRAP I*), 412 U.S. 669 (1973).

⁸⁷ *Id.* at § 391.

⁸⁸ *Id.* at § 391.

⁸⁹ SCOTT, *supra* note 41, at § 391.

⁹⁰ SCOTT, *supra* note 41, at §§ 2.4, 2.5.

⁹¹ SCOTT, *supra* note 41, at § 164.

⁹² SCOTT, *supra* note 41, at § 379.

⁹³ BOGERT, *supra* note 86, at 343-44.

⁹⁴ BOGERT, *supra* note 86, at 343-44; see SCOTT, *supra* note 41, at § 2.5.

management of the trust property.⁹⁵ The trustee must exercise these duties in a fashion concomitant with the espoused trust purpose.

1. Duties of Loyalty and Due Care

Inherent in the trustee's fiduciary responsibilities is a duty of loyalty to the beneficiary.⁹⁶ The trustee may not allow self-interest to interfere with the administration of the trust in a manner detrimental to the beneficiary's interest.⁹⁷ This duty of loyalty also restricts the trustee's ability to delegate certain administrative duties without the consent of the beneficiary.⁹⁸ Loyalty to the beneficiaries' interests requires reasonable administration.⁹⁹

The trustee, in performing his administrative duties, must exercise the care of a reasonably prudent trustee in similar circumstances.¹⁰⁰ The trustee is obligated to treat the beneficiary's interests with the same level of care that he would exercise on his own behalf.¹⁰¹ The trustee must exercise reasonable prudence and skill¹⁰² in conducting affairs relevant to the protection and preservation of the trust property¹⁰³ and promote the best interest of the beneficiary in fulfilling the purposes of the trust.¹⁰⁴ The terms of the trust are deemed to confer implicitly upon the trustee the powers necessary and appropriate to fulfill the designated purpose of the trust.¹⁰⁵ The discretion afforded the trustee is limited by the parameters of good faith and reasonable judgment.¹⁰⁶

2. Duty of Accounting

Since the trustee is charged with a high degree of control over the beneficiary's equitable interest in the corpus,¹⁰⁷ the common law of trusts has adopted an accounting process as a safeguard to

⁹⁵ REST., *supra* note 24, at § 186.

⁹⁶ *Id.*

⁹⁷ SCOTT, *supra* note 41, at § 170.

⁹⁸ REST., *supra* note 24, at § 171.

⁹⁹ *Id.* at § 2.5.

¹⁰⁰ *Id.* at § 174; SCOTT, *supra* note 41, at § 174.

¹⁰¹ REST., *supra* note 24, at § 174; SCOTT, *supra* note 41, at § 174.

¹⁰² REST., *supra* note 24, at § 174.

¹⁰³ *Id.* at § 176.

¹⁰⁴ *Id.* at § 186.

¹⁰⁵ *Id.*

¹⁰⁶ SCOTT, *supra* note 41, at § 187.

¹⁰⁷ BOGERT, *supra* note 86, at 4.

oversee the trustee in the exercise of his duties. The trustee is charged with the duty to keep account of the trust management¹⁰⁸ and to disclose all relevant information respecting the administration of the trust to the beneficiaries.¹⁰⁹ Accountability of the trustee serves two purposes: 1) to acquaint the beneficial owners of the corpus with the productivity of the corpus as it affects their interest;¹¹⁰ and 2) to prevent the trustee from abusing these interests by failing to provide some record of the trust administration.¹¹¹

The beneficiaries are entitled to request from the trustee any accounts and additional information pertinent to the trust administration.¹¹² Failure by the trustee to render such an accounting creates a presumption against the proper performance of his duties.¹¹³ Refusal to disclose information concerning the trust account is sufficient cause for the trustee's removal.¹¹⁴ Reviewing courts generally use a standard of management to assess the records of the trustee's judgment in managing the trust.¹¹⁵

3. Remedies for Inappropriate Trust Administration

Although as holder of legal title to the trust property the trustee has the discretion to exercise any powers he deems necessary to fulfill the purpose of the trust, an unreasonable extension of this privilege is considered a breach of trust.¹¹⁶ Any beneficiary of a trust, including one with only a future interest in the trust,¹¹⁷ is entitled to maintain a suit against the trustee to enforce the trust or to obtain redress for its breach.¹¹⁸ Violation by the trustee of any of his duties under the relationship constitutes a breach of trust,¹¹⁹ and renders the trustee liable to the beneficiary.¹²⁰ The equitable remedies available to a beneficiary for a breach of

¹⁰⁸ REST., *supra* note 24, at § 172; *see also* SCOTT, *supra* note 41, at § 172.

¹⁰⁹ REST., *supra* note 24, at § 173; *see also* SCOTT, *supra* note 41, at *Trusts* § 173.

¹¹⁰ SCOTT, *supra* note 41, at § 172.

¹¹¹ *Id.*

¹¹² REST., *supra* note 24, at § 173.

¹¹³ SCOTT, *supra* note 41, at § 172.

¹¹⁴ *Id.* at § 172.

¹¹⁵ *Id.* at § 187.2.

¹¹⁶ *Id.* at § 185A.

¹¹⁷ *Id.* at § 200.

¹¹⁸ REST., *supra* note 24, at § 200.

¹¹⁹ *Id.* at § 201.

¹²⁰ *See* SCOTT, *supra* note 41, at § 200.

trust¹²¹ include: 1) specific enforcement of the trustee's duties; 2) redress for breach of the trust; 3) an injunction against the imminent breach of trust; and 4) removal of the trustee.¹²²

The trustee must exercise integrity in the trust property management in order to withstand scrutiny based upon an assessment of "reasonableness." Such a standard is appropriate in light of the trustee's discretion over property of the beneficiary.¹²³ The role of the trustee is to fulfill the purpose of the trust in a manner beneficial to the equitable owner of the trust property. Trust law imposes such high standards of behavior on trustees to ensure that the goal of the trust will be attained. The availability of such injunctive relief as a measure to enforce the trust purpose reflects the importance of property and its appropriate disposition in American common law.

III. THE NATIONAL ENVIRONMENTAL POLICY ACT

Congress enacted the National Environmental Policy Act (NEPA) in recognition of the need for appropriate treatment of America's natural resources.¹²⁴ The statute itself acknowledges the federal government's continuing role as trustee of the American environment¹²⁵ and declares "each generation as trustee of the environment for succeeding generations."¹²⁶ Congress, empowered with a legal interest in the American "human environment,"¹²⁷ intended for NEPA to guide the federal government in the achievement of environmental protection.

Congress has the legal authority to determine how the public lands in the United States should be used. This authority is conferred upon the Congress through the Property Clause of the United States Constitution.¹²⁸ The Property Clause vests Congress with the authority to make "needful Rules and Regula-

¹²¹ Remedies in equity are available to the beneficiaries of the trust since historically the courts of equity had jurisdiction over trust administration. SCOTT, *supra* note 41, at § 197.

¹²² REST., at § 201.

¹²³ See *supra* text and notes at notes 100-06.

¹²⁴ According to the BUREAU OF LAND MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR, PUBLIC LAND STATISTICS 1980, there are 2.2 billion acres of land within the United States of which approximately 1/3 (or 738 million acres) are the responsibility of the federal government.

¹²⁵ 42 U.S.C. §§ 4321, 4331(a)(b) (1976).

¹²⁶ 42 U.S.C. § 4331(b)(1) (1976).

¹²⁷ 42 U.S.C. § 4332(2)(c) (1976).

¹²⁸ U.S. CONSTITUTION, Art. IV. § 3, cl.2.

tions" "respecting" federal property.¹²⁹ Some commentators advocate limiting the scope of the property power to protection of the land owned by the United States government.¹³⁰ In bequeathing Congress with an open-ended authority to promulgate such "needful Rules and Regulations," however, flexibility with regard to the scope of these rules is demanded as the country develops in a manner beyond the capacity of the Framers to foresee.¹³¹

NEPA is among those "needful Rules and Regulations" within congressional power to promulgate in the effort to implement an effective environmental policy. Through NEPA, Congress can be viewed as the settlor and federal agencies as the trustee. Thus, it can be argued that federal agencies exercise their responsibility as trustee of the American environment for the benefit of "present and future generations of Americans."¹³²

A. NEPA Purpose

During the mid to late 1960's, Congress became increasingly aware of the need to preserve the environment.¹³³ Congressional efforts to draft legislation during this time were designed "to reverse what seems to be a clear and intensifying trend toward environmental degradation."¹³⁴ In addition to its general desire to abate environmental harm, Congress was concerned with the lack

¹²⁹ *Id.*

¹³⁰ Frank & Eckhard, *Power of Congress Under the Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will 'Respecting Property' Go the Way of 'Affecting Commerce'?*, 15 NATURAL RESOURCES J. 663, 682-83 (1983).

¹³¹ In *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976), the Supreme Court, while discussing the limitations on state and federal authority over public lands, reaffirmed an expansive reading of the Property Clause.

¹³² 42 U.S.C. § 4331(a) (1976).

¹³³ N.Y. Times, May 3, 1969, at A34, col. 2; BAKER, *supra* note 6, at 7.

¹³⁴ H.R. REP. NO. 91-378, 91st Cong., 1st Sess. 3, reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2751, 2753. The enactment of NEPA was also prompted by the recognition that modern technology was advancing faster than society's ability to contain the adverse consequences ensuing from this growth. NEPA was viewed as a potential control on federal agencies' infatuation with this advanced technology. This aspect of NEPA has not always been considered in a manner consistent with the underlying purpose of the Act as a whole. Rather, it led many agencies to adopt a lenient attitude toward risks that inevitably accompany "the mixed blessings of progress." In determining procedural compliance under NEPA, the envisioned containment of technological threats has not always been achieved. See Lesser, *Putting Bite in NEPA's Bark: New Council on Environmental Quality Regulations for the Preparation of Environmental Impact Statements*, 13 U. MICH. J. L. REF. 367, 369 (1979-80); opening remarks of Judge Newman in his opinion in the *City of New York v. United States Department of Transportation*, 715 F.2d 732, 736 (2d Cir. 1983).

of environmental awareness of many federal agencies, whose policies were often in conflict with "the general public interest."¹³⁵ Prior to the enactment of NEPA, the failure by many federal agencies to give careful consideration to the environmental impact of their actions was challenged by parties seeking to infuse the agency decision-making process with a sense of public concern for the environment.¹³⁶ As a result of these concerns, Congress in 1969 enacted the National Environmental Policy Act, the purpose of which was to hold the federal government accountable as trustee for the protection of the American environment.¹³⁷

NEPA was conceived as an environmental policy dictate¹³⁸ to the federal government in response to the burgeoning public concern for the integrity of the environment.¹³⁹ In an effort to provide a comprehensive policy mandate to govern federal agency activities,¹⁴⁰ in all of their various forms, Congress drafted NEPA in broad language.¹⁴¹ Section 101 of the statute proclaims Congress' goal of creating an environmental protection policy to benefit the American public, present and future.¹⁴² This section declares that it is the federal government's national environmental policy

to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.¹⁴³

The Act further states that the government's duty to protect the

¹³⁵ 1969 U.S. Code Cong. & Ad. News 1753-54.

¹³⁶ See *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

¹³⁷ "NEPA's most basic purpose is providing Federal accountability for the environment." S. REP. NO. 94-52, 94th Cong., 1st Sess. 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 859, 865. See *supra* text and notes at notes 90-115.

¹³⁸ See S. REP. NO. 94-52, 94th Cong., 1st Sess. 2 (1975). (For a more cynical view of the basis for NEPA's passage, see LAKE, *supra* note 10, at 39, in which she contends that NEPA was merely a "symbolic gesture" made by Congress in 1969.)

¹³⁹ See generally, R. ODELL, ENVIRONMENTAL AWAKENING (1980), (see specifically Senator Edmund Muskie's foreword to this compilation of monthly reports issued by the Conservation Foundation, addressing environmental issues). See also Lake, *The Environmental Mandate: Activists and the Electorate*, 98 POL. SCI. Q. 215 (1983).

¹⁴⁰ ASSESSMENTS AND STATEMENTS, *supra* note 6, at 291.

¹⁴¹ *Id.* at 91.

¹⁴² 42 U.S.C. § 4321 (1976).

¹⁴³ 42 U.S.C. § 4331(a) (1976).

American environment includes responsibility for preserving the environment for future generations.¹⁴⁴

Section 102 outlines a procedural mechanism designed to implement this policy of environmental protection.¹⁴⁵ This section of the statute imposes upon all federal agencies a duty to account for their implementation of the policy of the Act.¹⁴⁶ The EIS must be composed of specific elements reflecting the agency decision-making process.¹⁴⁷ If properly prepared and presented, the EIS should provide the public with a proper record of an agency's diligence in reviewing effects on the environment.

Administrative agencies of the federal government are often charged with particular responsibilities which are inconsistent with the goal of environmental preservation.¹⁴⁸ For example, the Department of Transportation (DOT)¹⁴⁹ must design and supervise the construction of an interstate highway system which, by its physical nature, necessarily has an impact upon the environment. With the implementation of NEPA, federal agencies, such as DOT, must consider the environmental consequences of any proposed agency-sponsored action.¹⁵⁰ The Environmental Impact Statement process set forth in Section 102 enumerates specific procedural guidelines which agencies must observe in assessing environmental factors throughout the decision-making process. The EIS requirement provides an accounting record for the public of the agencies' consideration of the environmental consequences of their actions. Such a requirement is reminiscent of the accounting the trustee must render to the beneficiaries of a trust.¹⁵¹

Section 103 of the Act establishes the Council on Environmental Quality (CEQ).¹⁵² The CEQ was created to oversee federal agency implementation of NEPA and to provide recommendations on environmental matters to the Executive Office of the President.¹⁵³

¹⁴⁴ *Id.* at § 4331 (1976).

¹⁴⁵ 42 U.S.C. § 4332 (1976). *See infra* text and notes at notes 223-353.

¹⁴⁶ 42 U.S.C. § 4332(2)(c)(i) and (2) (1976).

¹⁴⁷ 42 U.S.C. § 4332(2)(c)(iii) (1976).

¹⁴⁸ *See generally*, Leventhal, *Environmental Decision-making and the Role of the Courts*, 122 U. PA. L. REV. 509 (1975).

¹⁴⁹ *See*, L. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* (1982) (DOT funded projects comprised the most numerous public works involved in environmental litigation.) *Id.* at 85-86.

¹⁵⁰ *See* *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

¹⁵¹ *See supra* text and notes at notes 107-15.

¹⁵² 82 U.S.C. §§ 4341-47 (1976).

¹⁵³ 42 U.S.C. § 4344 (1976).

The CEQ is responsible for the promulgation of regulations to implement the procedural provisions of NEPA.¹⁵⁴ For the most part, the CEQ has viewed its primary responsibility as that of an advisor to the President on environmental matters.¹⁵⁵ Under Section 103, the CEQ must issue an annual report of the environmental programs and policies of the federal government in an effort to distribute information to the American public about the environment.¹⁵⁶ Due to the broad language of the Act, however, the position of the CEQ as a dependent agency in the Executive Office affords an opportunity for executive influence upon the CEQ in its annual presentation of the environmental position of the federal government.¹⁵⁷

Due to the "vague"¹⁵⁸ wording of NEPA the judiciary has been called upon to delineate the actual impact of the Act upon the conduct of federal administrative agencies. Despite Congress' intent to vest the CEQ with this oversight function, the task of construing and enforcing the provisions of NEPA has been left primarily to the judiciary.¹⁵⁹

B. The Evolution of the NEPA Mandate to Administrative Agencies

Since the enactment of NEPA in 1969, numerous suits¹⁶⁰ have been instituted in an effort to determine the scope of the Act's substantive and procedural requirements.¹⁶¹ Judicial refinement and interpretation of NEPA has played an essential role in de-

¹⁵⁴ 40 C.F.R. § 1504; see *Andrus v. Sierra Club*, 442 U.S. 347 (1979).

¹⁵⁵ Arnold, *The Substantive Right to Environmental Quality Under the National Environmental Policy Act*, 3 ENV'T REP. (BNA) 50028 (1973). Due to its perception of its role, CEQ has been viewed by some commentators as overshadowed by the judiciary as "the most effective instrumentality for assuring the implementation of NEPA."

¹⁵⁶ 42 U.S.C. § 4344 (1976).

¹⁵⁷ See Lesser, *supra* note 134, n.21. Although signed into law as the first act of the 1970's by President Nixon, the administration fundamentally opposed the measure. It has been possible that an effort to maintain control over the environmental affairs as they affected government was accomplished through emasculation of a NEPA oversight body. As a dependent agency, CEQ does not wield the power necessary to enforce the NEPA mandate authoritatively. See *Andrus v. Sierra Club*, 442 U.S. 347 (1979).

¹⁵⁸ ASSESSMENTS AND STATEMENTS, *supra* note 6, at 91.

¹⁵⁹ Liroff, *The Council on Environmental Quality*, 3 ENV'T REP. (BNA) 50051 (1973).

¹⁶⁰ According to statistics issued by the Council on Environmental Quality (CEQ) there were 1,191 lawsuits filed against federal government agencies under NEPA between 1970 and 1980. See 1982 ENVIRONMENTAL QUALITY: 13TH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 234 (1983) (see discussion of The CEQ mission and authority, *supra* text and notes at notes 152-57).

¹⁶¹ 42 U.S.C. § 4332 (1976); 40 C.F.R. §§ 1500-1508 (1983).

termining the specific duties of federal agencies to consider the environmental impact of their actions in the agency decision-making process.¹⁶² Judicial decisions construing the provisions of NEPA have emphasized the "twin aims"¹⁶³ of the statute: 1) to provide the public with complete and accurate information about significant environmental consequences of agency actions; and 2) to ensure that federal agencies give these environmental consequences appropriate consideration in their decision-making process.¹⁶⁴

Some commentators have suggested that the primary purpose of NEPA is to open the federal agency administrative process to the public.¹⁶⁵ Yet, there is no specific reference in NEPA itself for public participation in the process.¹⁶⁶ In spite of statutory silence on this issue, the regulations promulgated by the CEQ and the procedural mechanism set forth in the statute clearly contemplate public scrutiny of agency decision making which has an impact upon the environment.¹⁶⁷ While some courts have recognized the statute as a "full-disclosure law,"¹⁶⁸ confusion over the importance of public scrutiny of agency behavior has led most courts to focus more upon agency consideration of the environmental impact of the proposed administrative action.

1. Consideration of Environmental Consequences in the Agency Decision-making Process

Many judicial decisions under NEPA have focused on the nature of agency responsibility for procedural compliance with the statute.¹⁶⁹ Section 102 of the Act imposes a high level of analysis in

¹⁶² ASSESSMENTS AND STATEMENTS, *supra* note 6, at 3-6; LAKE, ENVIRONMENTAL REGULATION, *supra* note 10, at ch.6.

¹⁶³ Baltimore Gas & Electric Co. et al. v. Natural Resources Defense Council, Inc., 51 U.S.L.W. 4678, 4680 (U.S. June 6, 1983).

¹⁶⁴ Action for Rational Transit v. West Side Highway, 536 F. Supp. 1225, 1252 (S.D.N.Y. 1982); Vermont Yankee Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068 (1st Cir. 1980); I-291 Why? Association v. Burns, 517 F.2d 1077 (2d Cir. 1975); Chelsea Neighborhood Association v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972).

¹⁶⁵ See Lesser, *supra* note 134, at 370; Comment, *The NEPA and Energy Legislation: The Preemption of Judicial Review*, 14 U.S.F.L. REV. 403, 405 (1980); McGerity, *The Courts, The Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 806-07 (1977).

¹⁶⁶ LAKE, *supra* note 10, at 96.

¹⁶⁷ See 40 C.F.R. §§ 1500.2(d), 1503.1(a)(3) (1983).

¹⁶⁸ Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 759 (E.D. Ark. 1971), *aff'd* 470 F.2d 289 (8th Cir. 1972).

the agency selection of a final course of action for a particular project. Agency officials are required to take a good faith "hard look"¹⁷⁰ at the adverse environmental impact of the proposed action¹⁷¹ before deciding how to best accomplish the desired result. The agency must then decide whether the proposed agency action and its consequences are consistent with public interest or whether it should adopt an alternative method of achieving the intended goal.¹⁷² To effectuate the trust purpose of environmental preservation, the agency official must consider the environmental consequences of agency action.

The goal of this environmental consideration provision is to require that agencies evaluate the environmental consequences of their actions early enough in the decision-making process to have an actual impact on the decision.¹⁷³ An evaluation of envi-

¹⁶⁹ See *Vermont Yankee*, 435 U.S. 519 (1978).

¹⁷⁰ 435 U.S. 519 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); see also, *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980).

There is judicial and academic confusion about whether the precise nature of the "hard look" doctrine is a judicial or administrative requirement. The late Judge Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit, widely respected for his analysis of the role of the judiciary vis-a-vis administrative agencies, originally articulated the doctrine. This view was earlier adopted in *Greater Boston Television Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 851 (D.C. Cir. 1970), and *Pike's Peak Broadcasting Co. v. Federal Trade Comm'n*, 422 F.2d 671 (D.C. Cir. 1969), cert. denied, 395 U.S. 979 (1969). Judge Leventhal presented the doctrine as the responsibility of an administrative agency in its decision-making process. Under his view the agency must take a "hard look" in the examination of any salient problems encountered in implementing its statutory mandate. This should evince reasoned decision-making in regard to a specific agency action.

A few years later Judge Leventhal presented the "hard look" as inherent in the judicial review of administrative rulemaking. *Maryland National Capital Park and Planning Comm'n v. United States Postal Service*, 487 F.2d 1029, 1037-38 and n.4 (D.C. Cir. 1973). This evolution of the hard look doctrine has been especially applied to cases arising under NEPA. See 435 U.S. 519 (1978); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

The judiciary takes a hard look to insure that the agencies have scrutinized the project as well. There are three elements comprising a court's "hard look" at agency decision making. Initially, the court must consult the governing statute to insure that the agency is complying with the substantive mandate. The court should then examine the procedural method of guaranteeing fairness in the agency decision-making process. Finally, the court focuses on the discretion in decision making exercised by the agency. The goal of this doctrine is to insure that there is evidence of reasoned decision making as the emphasized goal. Consequently, the agency must be able to explain through the administrative record why a particular course of action was adopted over another proposal. Through this hard look analysis the court attempts to insure agency fulfillment of its designated mission.

¹⁷¹ See *City of Davis v. Coleman*, 521 F.2d 661, 670 n.12 (9th Cir. 1975).

¹⁷² *Delaware Water Emergency Group v. Hansler*, 536 F. Supp. 26 (E.D. Pa. 1981).

¹⁷³ *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 953 (1st Cir. 1983).

ronmental consequences is likely to be effective only if the evaluation is made before alternative actions have been effectively foreclosed and before the agency has committed itself to a course of action.¹⁷⁴ The early timing of environmental commentary necessarily requires the inclusion of forecasting and reasonable speculation in the decision-making process.¹⁷⁵ As a result, federal agencies charged with noncompliance often assert that damage to the environment caused by their action was impossible to predict accurately.¹⁷⁶

This requirement for agencies to consider the environmental effects of their actions does not mean that these concerns alone must control the agency's selection of a final course of action. For example, in *Strycker's Bay Neighborhood Council v. Karlen*,¹⁷⁷ the plaintiffs challenged under NEPA an urban renewal plan devised by the Department of Housing and Urban Development (HUD) designating a site for low income housing in a wealthy neighborhood. The Supreme Court held that federal agencies were required only to "consider" the environmental consequences of any proposed action, and did not have to base their decision solely on environmental preference.¹⁷⁸ The Court stated that the goal of NEPA was to insure well-informed and well-considered agency action.¹⁷⁹ According to the Court, once the agency considers the environmental impact of its project, it does not necessarily have to elevate its environmental determinations above the other factors pertinent to its final decision.¹⁸⁰

Prior to the Supreme Court decision in *Karlen*, federal courts had offered conflicting interpretations of the weight to be accorded environmental factors in the decision-making process.¹⁸¹ It is now well established that NEPA was not intended to preclude all federal actions which may have adverse environmental conse-

¹⁷⁴ RODGERS, *supra* note 86, at § 7.7, 767.

¹⁷⁵ *Scientists' Institutes for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

¹⁷⁶ *Id.* at 1092.

¹⁷⁷ 444 U.S. 223 (1980).

¹⁷⁸ *Id.* at 227.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 227-28.

¹⁸¹ See *supra* note 165, at 418 (1980); see also Leventhal, *supra* note 35. (Leventhal wrote that "environmental factors must serve as significant inputs to governmental policy and must be weighed heavily in the decisional balances. It is the function of review under NEPA to ensure that this purpose is served"). *Id.* at 515.

quences.¹⁸² NEPA was designed to have equal applicability to agencies with various and often divergent missions.¹⁸³ Each agency was created for a particular purpose.¹⁸⁴ In analyzing various methods of accomplishing their goals, agency decision-makers must balance a variety of elements; the environmental element is only one of many competing factors. Agencies, similar to trustees, must make decisions to provide the greatest benefit to the public. This responsibility may be achieved through a variety of methods.

NEPA thus permits agencies to select a course of action with a less desirable environmental impact in order to satisfy a goal important to the public interest.¹⁸⁵ While the balancing of various national interests is a subjective process,¹⁸⁶ a federal agency is nonetheless required to comply with the NEPA mandate of considering in good faith the environmental consequences of its actions in performing its agency function.¹⁸⁷ Otherwise, judicial tolerance of mere *pro forma* compliance with this requirement would have the potential effect of undermining the fundamental environmental policy of the Act.¹⁸⁸

Agency foresight of environmental consequences is a necessary component of a reasoned decision-making process. In this respect NEPA requires the agency to act in a manner consistent with the duties of a trustee.¹⁸⁹ Commensurate with the standard of reasonable prudence,¹⁹⁰ which the trustee must exercise, are the standards for agency behavior within the statute itself. While the

¹⁸² Delaware Water Emergency Group v. Hansler, 536 F. Supp. 26, 44 (E.D. Pa. 1981); Commonwealth of Massachusetts v. Watt, 716 F.2d at 952.

¹⁸³ S. REP. NO. 94-52, 94th Cong., 1st Sess. 7, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 859, 865. See also Leventhal, *supra* note 35.

¹⁸⁴ Leventhal, *supra* note 35, at 509.

¹⁸⁵ Commonwealth of Massachusetts v. Watt, 716 F.2d at 952.

¹⁸⁶ See Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d at 1123 (NEPA mandates case-by-case balancing judgment on the part of federal agencies).

¹⁸⁷ Commonwealth of Puerto Rico v. Muskie, 507 F. Supp. 1035, 1055 (D. Puerto Rico 1981) (additional good faith); 449 F.2d at 1112-13.

¹⁸⁸ Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972). The difficulty in ascertaining the degree to which a federal agency has actually given adequate attention to the substantive concerns about the nation's environment was recognized by the legislature in its discussion of the contemplated bill. Discussion focused on the statute's compliance standard of "to the fullest extent possible." The legislators were concerned about agency circumvention of their duties under NEPA because of the broad meaning of these words. 1969 U.S. CODE CONG. & AD. NEWS 2751, 2770.

¹⁸⁹ See *supra* text and notes at notes 90-115.

¹⁹⁰ See *supra* text and notes at note 100.

federal government is responsible for "restoring and maintaining environmental quality,"¹⁹¹ it must exercise this duty within the bounds of "all practicable means."¹⁹² Such an obligation to conduct the agency affairs reasonably in light of environmental considerations is analogous to the fiduciary duties owed by the trustee in maintaining the trust in the best interest of the beneficiary.¹⁹³

2. NEPA: Substance or Procedure?

NEPA's effectiveness in promoting environmentally sound agency decision-making depends in large part upon whether courts view the Act as a substantive or procedural mandate.¹⁹⁴ Judicial interpretation of this question remains unsettled. This lack of judicial consensus¹⁹⁵ concerning the nature of the Act's provisions¹⁹⁶ has impeded the ability of federal agencies to develop effective methods of compliance.¹⁹⁷ Some courts have held that merely perfunctory satisfaction of the procedures outlined in Section 102 is insufficient.¹⁹⁸ Yet the Supreme Court, in *Vermont Yankee Power Group, Inc. v. Natural Resources Defense Council, Inc.*,¹⁹⁹ found that "NEPA does set forth significant substantive goals for the nation, but its mandate to the agencies is essentially

¹⁹¹ 42 U.S.C. § 4331(a) (1976).

¹⁹² 42 U.S.C. § 4331(b) (1976).

¹⁹³ See *supra* text and note at note 96.

¹⁹⁴ See *Vermont Yankee*, 435 U.S. 519 (1978); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *contra Calvert Cliffs'*, 449 F.2d 1109 (D.C. Cir. 1971); Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARVARD L. REV. 735 at 748-50 (In this note, the author suggests that the language of Section 101(b) provides judicially manageable standards which allow substantive review of NEPA. The author's position is inclusion of the statutory language of "practicability" and "consistency with national policy" requires environmental considerations to control where environmentally preferable alternatives are available; the author contends that in this situation, the least adverse environmental alternative must be selected.)

¹⁹⁵ In *Vermont Yankee*, Justice Rehnquist stated that while NEPA established substantive goals for the nation, its mandate to the federal agencies is "essentially procedural." 435 U.S. at 558. Some lower courts, however, have implied that a substantive review of agency performance is appropriate in light of the statute's mandate. See *Calvert Cliffs'*, 449 F.2d 1109 (D.C. Cir. 1971); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970); *Gulf Oil Co. v. Morton*, 493 F.2d 141 (9th Cir. 1973); *Detroit Edison Co. v. NRC*, 630 F.2d 450 (6th Cir. 1980); see generally Arnold, *supra* note 155.

¹⁹⁶ LAKE, *supra* note 10, at 101. Lake contends that interpretation of NEPA as a substantive mandate amounts to an imposition of substantive due process. See also Justice Bazelon's remarks in *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (primary function of the courts to "protect these interests from administrative arbitrariness").

¹⁹⁷ ASSESSMENTS AND STATEMENTS, *supra* note 6, at 292.

¹⁹⁸ 449 F.2d at 1112.

¹⁹⁹ 435 U.S. 519 (1978).

procedural.”²⁰⁰ This discrepancy represents a conflicting judicial vision of the role of the courts in implementing the statute.²⁰¹

Some courts have expressed doubt about whether the judiciary can give substantive meaning to the provisions of NEPA. For example, in *Sierra Club v. Sigler*,²⁰² the court addressed the issue of whether an agency was required to consider a “worst case analysis”²⁰³ in evaluating a project pursuant to NEPA. In discussing the depth with which the agency was required to consider the environmental effects of its actions, the court declared that NEPA was “a short statute with broad goals and imprecise methods of accomplishing them.”²⁰⁴ However, if the statute is viewed as a flexible tool designed to establish cultivation of an environmental quality standard for future generations, this appears an unduly pessimistic analysis.

A close reading of the broad policy statement in Section 101(b) of NEPA suggests that the statute provides sufficiently ascertainable parameters²⁰⁵ to constitute an enforceable legal mandate. The substantive goal of the Act is to promote agency decision making that is sensitive to environmental concerns.²⁰⁶ Environmental protection *per se* is not the exclusive goal; the Act is designed to require the inclusion of the environmental factors among the numerous factors considered by a federal agency in its decision-making process.²⁰⁷ The substance of the Act has been judicially recognized as an enforceable duty of federal administrative agencies.²⁰⁸

²⁰⁰ 435 U.S. at 558. However, language in the seminal Supreme Court case, *Calvert Cliffs*, could be viewed as the catalyst to substantive review under NEPA. “The duty of the judiciary . . . is to ensure that environmental purposes, heralded in legislative halls, are not lost or misdirected in the vast hallways of administrative bureaucracy.” 499 F.2d at 1111.

²⁰¹ LAKE, *supra* note 10, at 97-114.

²⁰² 695 F.2d 957 (5th Cir. 1983).

²⁰³ *Id.* at 971-72.

²⁰⁴ *Id.* at 965.

²⁰⁵ See RODGERS, *supra* note 86, at §§ 7.3, 7.4; see also *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 297-98 (8th Cir. 1972); ENVIRONMENTAL QUALITY - 8TH ANNUAL REPORT OF THE CEQ (1977).

²⁰⁶ See Arnold, *supra* note 155, at 50030-31; Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. INDUS. COMM. L. REV. 685, 693 (1972).

²⁰⁷ 449 F.2d at 1118.

²⁰⁸ *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977); *Sierra Club v. Morton*, 514 F.2d 856, 874-75 (D.C. Cir. 1975); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 492 F.2d 1123, 1138-40 (5th Cir. 1974); *Sierra Club v. Froehlke*, 486 F.2d 946, 953 (7th Cir. 1973); *Conservation Council of North Carolina v. Froehlke*, 473 F.2d 664,

There is, however, judicial opposition to the idea of treating NEPA as a substantive mandate.²⁰⁹ In fact, the majority of United States Supreme Court Justices have considered NEPA as a procedural requirement.²¹⁰ The Court's objection to a substantive interpretation of NEPA is based in large part on the notion of separation of powers. Courts denying the legitimacy of substantive review have resisted an expansion of the judicial role into the sphere of administrative authority.²¹¹ They contend that this inappropriate assumption of authority undermines the legislative role of policy making.²¹² In addition, proponents of construing NEPA as a procedural mandate are concerned about the potential loss of judicial neutrality through the active direction of the NEPA mandate²¹³ — undermining judicial credibility in the eyes of the public. According to advocates of judicial self-restraint, NEPA created an area of discretion in agency decision making. Absent procedural noncompliance, the courts should not impose their own judgment as to the appropriate agency decision.²¹⁴

Enforcement of the procedural EIS requirement²¹⁵ ensures substantive compliance with NEPA. Through this procedural requirement NEPA places more exacting strictures upon agency decision making than do most statutes.²¹⁶ Thus, through procedural obligations, federal agencies comply with a substantive policy.

664-65 (4th Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 298 (8th Cir. 1972); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1168 (1st Cir. 1980).

²⁰⁹ See *LAKE*, *supra* note 10, at 104; *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971).

²¹⁰ See *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (the only procedural mandates imposed by NEPA are those expressly delineated in the language of the statute); *Vermont Yankee Power Group, Inc. v. NRDC*, 435 U.S. 519 (1978); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. at 227; see Comment, *Vermont Yankee: Supreme Court Sets New Limits on Judicial Review of Agency Rule Making*, 8 ENVTL. L. REP. (ENVTL. L. INST.) 10103 (1978) (a minority view does exist, however, which would entitle lower courts' judges to substantive evaluation of an EIS). See Wenner, *supra* note 150 at 175.

²¹¹ *Lake*, *supra* note 10, at 110. It has been suggested that administrative agencies now constitute a fourth branch in the federal bureaucracy. See *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

²¹² *LAKE*, *supra* note 10, at 111.

²¹³ *TRIBE*, ENVIRONMENTAL LAW 659 (1971) at 659.

²¹⁴ See 444 U.S. at 227; 427 U.S. at 410 n.21; but see *contra*, Kelly, *Judicial Review of Agency Decisions Under the National Governmental Policy Act of 1969: Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 10 B.C. ENVTL AFF. L. REV. 79, 97 (1982).

²¹⁵ 42 U.S.C. § 4332(c); see *infra* text and notes at note 228.

²¹⁶ See *supra* note 165 at 407.

NEPA encourages substantive environmental sensitivity, if not protection, through the procedural requirements of disclosing the basis for agency action.²¹⁷ According to *Vermont Yankee*:

The key requirement of NEPA . . . is that the agency consider and disclose the actual environmental effects . . . in a manner that will ensure that the overall process, including both the generic rulemaking and the individual proceedings, brings those effects to bear on decisions to take particular actions that significantly affect the environment.²¹⁸

This "key requirement of NEPA," the EIS, has been the focal point of substantive litigation.²¹⁹ However, judicial perceptions of what constitutes sufficient procedural compliance have varied due to the conflict about the actual import of the statute itself.

Confusion about the nature of NEPA's prevailing strength undermines the potential of the Act as a valid national environmental policy.²²⁰ Until the exact nature of the NEPA mandate is resolved, agencies cannot meet the statutory directive of compliance "to the fullest extent possible."²²¹ As the trustees of the environment, federal agencies are left without a cogent sense of the true trust purpose. Consequently, it is impossible for such a trustee to implement policy directives of the statute in a manner best suited to the needs of the beneficiaries — the American public.²²²

IV. THE ENVIRONMENTAL IMPACT STATEMENT

The Environmental Impact Statement (EIS) can be considered a method of accounting imposed by NEPA upon the agencies acting as trustees of the environment to benefit the public.²²³ As trustees, the federal agencies must provide a record of the analysis used in selecting a plan of implementation for a proposed project.²²⁴ Congress imposed the procedural requirements of the EIS to achieve the statutory goal of environmental awareness in agency decision making.²²⁵ This procedural guarantee is analo-

²¹⁷ *Grazing Fields Farm v. Goldschmidt*, 626 F.2d at 1073.

²¹⁸ *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 51 U.S.L.W. at 4680.

²¹⁹ WENNER, *supra* note 150, at 83.

²²⁰ ASSESSMENTS AND STATEMENTS, *supra* note 6, at 91.

²²¹ 42 U.S.C. § 4332 (1976).

²²² See *supra* text and notes at notes 108-11. See also 40 C.F.R. § 1508.11 (1983).

²²³ See *supra* text and notes at notes 105-23.

²²⁴ 42 U.S.C. § 4332(2)(c) (1976); 40 C.F.R. § 1502 (1983).

²²⁵ 40 C.F.R. § 1500.1 (1983).

gous to the fiduciary duty of accounting imposed on the trustee in a trust relationship.²²⁶ Just as the trustee who is provided with an express accounting procedure in the terms of the charitable trust instrument itself, federal agencies have a duty to comply with the accounting method outlined in Section 102 of NEPA.²²⁷ While the fiduciary-like relationship between the agencies and the American public should compel a high standard of compliance with the EIS requirement, judicial interpretations of federal agency responsibilities have not been consistent.

A. Purpose of the EIS

The EIS provision includes the key procedural requirement necessary to fulfill the statutory goals of NEPA. Section 102(2)(c) of NEPA requires that all agencies of the federal government:

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.²²⁸

While this language specifies the components required of the EIS, the scope of compliance has been the subject of conflicting interpretations by agencies as well as the courts.²²⁹

The EIS procedures serve a two-fold purpose: 1) to ensure that federal agencies have adequate information about the potential environmental consequences of their actions and about legitimate alternatives to the proposed action; and 2) to alert the public to any possible negative environmental effects of the proposed

²²⁶ See *supra* text and notes at notes 108-11.

²²⁷ 42 U.S.C. § 4332(2)(c) (1976).

²²⁸ *Id.*

²²⁹ See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); see also Note, *National Environmental Policy Act: An Ambitious Purpose, A Partial Demise*, 15 TULSA L.J. 553, 554 (1980); F. ANDERSON, *supra* note 86.

agency action.²³⁰ Congress' intent in enacting the EIS requirement was to enforce its national environmental policy through specified procedures,²³¹ thereby holding the federal agencies accountable to a fiduciary standard²³² for the consequences of agency actions implemented upon completion of the EIS procedures.²³³ The EIS section of NEPA directs federal agencies to employ a systematic approach to planning and decision making in light of environmental concerns.²³⁴

This perspective of the EIS is reflected in the CEQ regulations which implement NEPA:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment²³⁵

It is through the vehicle of Section 102(2)(c) accounting and evaluation procedures that agencies fulfill the mandate of NEPA. Primary responsibility for satisfying these requirements rests with the agency itself.²³⁶

The presumption underlying the EIS requirement is that once presented with relevant information regarding the effects of a proposed action, federal agencies will be reluctant to commit to any projects with a demonstrated potential for imposing an unduly adverse impact upon the environment.²³⁷ While this may seem an optimistic assessment of the federal bureaucratic process, the mandated public notice and comment procedures upon the EIS submitted by the agency is the most effective check on

²³⁰ *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974).

²³¹ 115 CONG. REC. 40,416; 40,419 (1969).

²³² See *supra* text and notes at notes 90-115.

²³³ Lesser, *supra* note 135, at 436.

²³⁴ ASSESSMENTS AND STATEMENTS, *supra* note 6, at 87.

²³⁵ 40 C.F.R. § 1502.1 (1983).

²³⁶ 449 F.2d at 1114 (D.C. Cir. 1971). See Judge Skelly Wright's description of the NEPA procedural mandate in this seminal case of judicial interpretation of NEPA requirements as to be strictly adhered to by the agencies. *Id.*

²³⁷ 449 F.2d at 1114; *Weinberger v. Catholic Action of Hawaii/Peace Action Educ. Project*, 454 U.S. 139, 143 (1981); *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).

the agency's action.²³⁸ Public participation in the federal agency decision-making process is an important procedural safeguard against agency actions that impose an undue burden on the environment,²³⁹ and is consistent with NEPA's goal of availing administrative planning to public scrutiny. This public comment procedure is analogous to the trust beneficiary's opportunity to force the trustee to render an account of his performance in administering the trust property.²⁴⁰

Public participation in the decision-making process acts as a check upon agency action in affording review of the merits of the decision proposed or actually made. Agency decision making may be influenced by the public response to a particular proposal.²⁴¹ Hence, coupled with the EIS submission requirement, it has a two-fold purpose: 1) to permit the public to protect its own interest in the environment through response to government action; and 2) to act as a watchdog to the actual decisions of an agency which could obviate the necessity of challenging agency decisions in court. Implicit in this statutory insistence upon public contribution to agency determination about the harm or effects of any particular agency action is the acknowledgement of a governmental responsibility to the public regarding its treatment of their environment. The American public constitutes the class of beneficiaries²⁴² under NEPA. Protection of the environment for this class of persons is beneficial to the nation and could be viewed as a charitable purpose.²⁴³

B. Threshold Determinations Necessary to Require an EIS

Early in the NEPA process the agency must determine whether the proposal presented for implementation is a major federal action which will significantly affect the human environment,²⁴⁴ thereby triggering the requirement of an EIS prepara-

²³⁸ *California v. Bergland*, 483 F. Supp. 465, 496 (E.D. Cal. 1980), *aff'd in part, rev'd in part on other grounds*, 690 F.2d 753 (9th Cir. 1982); *I-291 Why? Association v. Burns*, 372 F. Supp. 223, 227 (D. Conn. 1974).

²³⁹ *Alaska v. Andrus*, 580 F.2d 465, 474 (D.C. Cir. 1978).

²⁴⁰ See *supra* text and notes at notes 118, 122.

²⁴¹ *Commonwealth of Massachusetts v. Watt*, 716 F.2d at 951.

²⁴² See *supra* text and notes at notes 77, 79.

²⁴³ See *supra* text and notes at notes 71, 73.

²⁴⁴ Cf. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 224-25 (1980); *Hanly v. Mitchell*, 460 F.2d 640, 644 (2d Cir. 1975); *Aertsen v. Landrieu*, 637 F.2d 12, 19 (1st Cir. 1980).

tion.²⁴⁵ The threshold determinations as to the necessity of an EIS preparation²⁴⁶ were the subject of a great deal of controversy in the years following the implementation of NEPA. Since then, however, the CEQ regulations, effective July 30, 1979²⁴⁷ have essentially codified the federal court decisions on those threshold issues and have provided a clear standard for agencies to determine whether their proposed actions invoke the procedural parts of the EIS.

1. Significant Impact

Although the federal regulations promulgated by the CEQ have been successful in eliminating confusion as to when an EIS is required,²⁴⁸ and are of valid application,²⁴⁹ interpretation of the statute has not been exhausted. For example, controversy still remains over NEPA's reference to "impact".

Courts generally give great deference to agency determinations regarding the level of harm that would result from their proposed actions. This judicial posture affords federal agencies significant latitude in deciding whether there are sufficient environmental effects to warrant the preparation of an EIS.²⁵⁰ This deference accorded to agency decisions as to whether an EIS is required, however, is not adopted by all reviewing courts.

The Ninth Circuit has adopted a much more restrictive test for determining the necessity of an EIS preparation due to significant impact on the environment of a proposed action.²⁵¹ Under

²⁴⁵ *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1091 (D.C. Cir. 1973) (the other threshold agency activity which requires an EIS preparation is any recommendation or report upon agency proposal for legislations).

²⁴⁶ See *Joseph v. Adams*, 467 F. Supp. 1451, 1454 (E.D. Mich. 1979) (posed test for significant impact as "that whose reasonably expected environmental consequences would, in order to comply with the substantive policies of NEPA, effect a decision concerning the need for, or the proposed location or design of, the federal proposal"); see *supra* note 165.

²⁴⁷ 43 Fed. Reg. 55,978 col. 2 (1978); ENVIRONMENTAL QUALITY 1981: 12TH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 171 (1982); Yost, *Streamlining NEPA: An Environmental Success Story*, 9 B.C. ENVTL AFF. L. REV. 507, 509 (1981-82).

²⁴⁸ See Yost, *supra* note 247, at 507. (At the time the article was written and published, the author was the General Counsel to the Council on Environmental Quality in the Executive Office of the President. Since that time, he has compiled an excellent practitioner's guide to THE ENVIRONMENTAL IMPACT STATEMENT PROCESS C.P.S. (BNA) 27 (1982) [hereinafter EIS PROCESS].

²⁴⁹ *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

²⁵⁰ *New York v. U.S. Department of Transportation*, 715 F.2d 732, 750 (2d Cir. 1983).

²⁵¹ See *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1982). See also *Foundation for*

this strict approach, the EIS requirement is triggered whenever a federal action "may cause significant degradation of some environmental factor."²⁵² The implications of this test as so worded limit the sphere of its influence to a narrow category of environmental effects. Only those environmental consequences of a proposed agency action which have already been determined to ultimately degrade the environment will be considered sufficient to require an EIS. Any environmental effect of a proposed action which does not meet the "degradation" standard falls short of the threshold requirement for the development of an EIS.²⁵³ This high threshold standard seems to be contrary to the prophylactic purpose of NEPA. It confines the necessity of the EIS to instances of potentially extreme environmental degradation, a difficult threshold to meet. This is inconsistent with the fiduciary standard of duty owed by the trustee to the trust beneficiaries in the treatment of the trust property.

If an agency concludes, after preparing an Environmental Assessment,²⁵⁴ that its proposed action will not promote or cause any significant impacts upon the environment, it must submit an evaluative report to the CEQ supporting that conclusion.²⁵⁵ An agency's "negative determination" and submission of a "Finding of No Significant Impact" (FONSI) report does not, however, relieve the agency of all further participation in the EIS procedures. Under the CEQ regulations, the agency must afford the public thirty days to review this finding before it may initiate any action upon the proposal.²⁵⁶ The FONSI report must be clearly supported by the evidence in order to satisfy public evaluation. This review is necessary to ensure that agencies do not use the FONSI report to avoid the process of accountability implicit in the NEPA mandate.²⁵⁷

The circuit courts are divided as to the standard of review to be employed to evaluate the validity of an agency's negative deter-

North American Wild Sheep v. United States Dept. of Agriculture, 681 F.2d 1172 (9th Cir. 1982).

²⁵² *Davis*, 521 F.2d at 673; *Sheep*, 681 F.2d at 1178.

²⁵³ *Davis*, 521 F.2d at 673; *Environmental Defense Fund v. Armstrong*, 487 F.2d 814, 817 n.5 (9th Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973).

²⁵⁴ 40 C.F.R. §§ 1501.3, 1501.4 (1983).

²⁵⁵ 40 C.F.R. §§ 1501.4(c), 1508.13 (1983).

²⁵⁶ 40 C.F.R. § 1501.4 (1983).

²⁵⁷ See *CEQ Memorandum Answering Common NEPA Questions* questions 37e-38 reprinted in *EIS PROCESS*, *supra* note 248, at B-812.

mination.²⁵⁸ The courts have adopted three different views of the judicial responsibility to review such agency findings.²⁵⁹ Upon review of a "negative determination" regarding an EIS, the Seventh, Fourth, and the Second Circuits accord great deference to the agency's expertise and employ the low threshold "arbitrary and capricious" standard²⁶⁰ to review the agency finding.²⁶¹ In contrast, the Fifth, Eighth, and Tenth Circuits have applied a more stringent "reasonableness" test, which requires an evaluation of supporting evidence in the record to determine whether there is a rational basis for the agency's finding.²⁶² This standard of review for agency "negative determinations" accords less deference to the agency and reflects judicial skepticism of agency good faith efforts to comply with NEPA.²⁶³ The D.C. Circuit uses a third standard of review which employs Judge Skelly Wright's analysis²⁶⁴ of the agency determination not to file an EIS.²⁶⁵ Absent a more consistent standard of review, the judiciary provides little guidance for agencies in determining what is sufficient for NEPA compliance. This lack of consensus illustrates the judiciary's inability to agree on the statutory requirements imposed by agency decisions.

2. Major Federal Action

"Major federal action"²⁶⁶ is yet another threshold for the requirement of EIS preparation.²⁶⁷ The CEQ regulations expressly

²⁵⁸ Delaware Water Emergency Group v. Hansler, 536 F. Supp. 26, 37 (E.D. Pa. 1981).

²⁵⁹ NEPA itself does not confer a grant of standing. See *supra* note 86.

²⁶⁰ See The Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (1982).

²⁶¹ First National Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973); Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972).

²⁶² 5 U.S.C. § 55 (1982).

²⁶³ Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).

²⁶⁴ Judge Skelly Wright of the D.C. Circuit presented his view of the EIS threshold requirement in *Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States*, 346 F. Supp. 189, 201 (D.C. Cir. 1972). In this case Judge Wright was concerned about the ICC's attempts to circumvent the compliance with the NEPA mandate through an internal finding of "no significant impact." Favoring preservation of the environment over the railroad companies' assertion of increased railroad efficiency of operation as he balanced public interest, Judge Wright used strong language in *SCRAP II*. He was offended by "so transparent a ruse" on the part of the ICC which may have contributed to his evocation of a low threshold to be satisfied to qualify for the NEPA procedural requirements. *Id.*

²⁶⁵ *SCRAP II*, 346 F. Supp. at 201.

²⁶⁶ 40 C.F.R. § 1508.18 (1983).

²⁶⁷ 42 U.S.C. § 4332(2)(c) (1976).

address the types of action which come within the ambit of the statute. Essentially, "major" of major federal action and "significantly" of significantly affecting the quality of the human environment blur as distinct concepts and requirements; the regulations define "major" as reinforcement of, but not independent of "significantly."²⁶⁸

Both courts and agencies have struggled to define the parameters of a "federal" action. This problem has arisen frequently in determining whether federal agency supervision²⁶⁹ or planning of a project²⁷⁰ should be considered tantamount to a "federal" action. Similarly, this issue has arisen in cases where agency action or involvement is contemplated but has yet to occur.²⁷¹ Case law discussion of what actually constitutes agency action sufficient to require compliance with the EIS requirements suggests that even the most tenuous federal participation will make a project "federal."²⁷² In most instances, any agency action or proposal is presumed to be a "federal" action,²⁷³ thereby subjecting most agency actions to the policies and procedures outlined in NEPA. This could be interpreted as judicial recognition of the NEPA directive governing all federal activity affecting the environment. Such an interpretation provides federal agencies with a responsibility commensurate with the standard of duty owed by agencies in their capacity as trustees of the environment.²⁷⁴

Despite the CEQ regulations of the "major federal action" provision, the distinction between *active* federal participation in a project and the mere *implementation* of a project or federal issuance of a permit to those engaged in private activity remains a contested issue.²⁷⁵ For example, in *Roosevelt Campobello International Park Commission v. United States Environmental Protection Agency*,²⁷⁶ the First Circuit held that the EPA's issuance of a

²⁶⁸ 40 C.F.R. § 1508.18 (1983). "Major federal" has been defined as that which "requires substantial planning, time, resources or expenditure." *National Resources Defense Council v. Grant*, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972).

²⁶⁹ *Davis v. Morton*, 335 F. Supp. 1258 (D.N. Mex. 1971), *rev'd* 469 F.2d 593 (10th Cir. 1973).

²⁷⁰ 40 C.F.R. § 1508.18(a) (1983).

²⁷¹ I. SCHOENBAUM, *ENVIRONMENTAL POLICY LAW*, at 118 (1982).

²⁷² MCGREGOR, *ENVIRONMENTAL LAW* 110 (1981).

²⁷³ *Id.*

²⁷⁴ See *supra* text and notes at notes 90-115.

²⁷⁵ See *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973); *Boston Waterfront Residents Association v. Romney*, 343 F. Supp. 89 (D. Mass. 1972); *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972); 40 C.F.R. § 1508.18(a) (1983).

²⁷⁶ 684 F.2d 1041 (1st Cir. 1982).

pollution discharge permit²⁷⁷ allowing private parties to construct an oil refinery and deep water port invoked the procedural requirements of the EIS.²⁷⁸ The court found that the EPA license was based on insufficient analysis and ordered the EPA to file a supplemental EIS before approving the project.²⁷⁹

The court did not specifically address the issue of whether the EPA permit process constituted federal action but merely assumed that the issuance of the permit subjected the EPA to the EIS requirements.²⁸⁰ However, the court did agree with the EPA's argument that privately sponsored projects should be judged by a different standard than publicly funded projects.²⁸¹ In evaluating the alternatives to the proposal in question, the EPA applied the more lenient test of "whether the proposed site is environmentally acceptable," rather than the analysis used in evaluating publicly funded projects of whether the proposed site is the "optimum site."²⁸² The court implicitly adopted the agency's argument that the "less searching analysis"²⁸³ of "substantially preferable"²⁸⁴ alternatives is appropriate when agency funding or implementation is not instrumental to the project's success.

Underlying this distinction between publicly and privately funded projects is the belief that federal license and permit procedures render private actions "federal" in nature for the purposes of NEPA compliance.²⁸⁵ This assumption extends the applicability of the EIS requirements beyond the confines of federal agencies and public projects.

Reliance upon government funding as a trigger mechanism for compliance with the EIS provisions seems to contradict *Andrus v. Sierra Club*,²⁸⁶ where the United States Supreme Court ruled that an EIS is not required to accompany agency appropriations re-

²⁷⁷ 33 U.S.C. §§ 1251-1376, 1342 (Supp. V 1981).

²⁷⁸ 684 F.2d at 1055.

²⁷⁹ *Id.* at 1057.

²⁸⁰ 40 C.F.R. § 1508.18 (1983).

²⁸¹ 684 F.2d at 1047.

²⁸² *Id.* at 1046.

²⁸³ ENVIRONMENTAL QUALITY 1982, *supra* note 17 at 237.

²⁸⁴ 684 F.2d at 1047; *cf.* New England Coalition on Nuclear Pollution v. Nuclear Regulatory Comm'n, 582 F.2d 87, at 95-96 (1st Cir. 1978).

²⁸⁵ 40 C.F.R. § 1508.18(a) (1983) ("including projects and programs entirely or partly financed, assisted, conducted, regulated or approved by Federal agencies").

²⁸⁶ 442 U.S. 347 (1979). See Note, *NEPA After Andrus v. Sierra Club: The Doctrine of Substantial Deference to the Regulations Council on Environmental Quality*, 66 VA. L. REV. 843 (1980).

quests.²⁸⁷ In that case, the Court relied upon the CEQ definition of "major" as dependent but supplemental to "significant" in reaching this conclusion. The First Circuit, in an opinion delivered prior to *Roosevelt Campobello*, also used a narrow definition to avoid imposing the EIS requirement at the funding stage. The Court in *Aertsen v. Landrieu*²⁸⁸ held that funds designated for expenditure by an agency did not come within the scope of "resources" as statutorily prescribed.²⁸⁹

The essence of NEPA is contradicted by this holding,²⁹⁰ since decisions made at the funding stage of an agency project affect the ultimate course of action selected and implementation of that project. Some commentators have interpreted this finding as indicative of a conservative trend in the judiciary toward environmental issues²⁹¹ which de-emphasizes the values of conservation in the regulation of agency decision making.²⁹² This decision jeopardizes the effectiveness of NEPA's policy goals, since it eliminates the opportunity to influence decision making early in the process, such as at the appropriations stage.²⁹³

C. EIS Preparation

1. Compliance

Once the threshold requirements of Section 102(2)(c)²⁹⁴ have been satisfied, the appropriate federal agency must comply with the procedural requirements outlined in NEPA. These procedures were conceived as the best way of achieving the environmental policy.²⁹⁵ Primary judicial focus upon the procedural aspect of NEPA²⁹⁶ is justified due to the reflection of agency attempts to comply with the statute embodied in the EIS — providing a mechanism for challenge to a proposed agency action.²⁹⁷ Section

²⁸⁷ 40 C.F.R. § 1508.18 (1978).

²⁸⁸ 637 F.2d at 20.

²⁸⁹ 42 U.S.C. § 4332(2)(c) (1976). See Note, *supra* note 286, at 849.

²⁹⁰ See *supra* note 229, at 554.

²⁹¹ *Id.* at 519; Frank & Eckhard, *supra* note 130, 682-83.

²⁹² Eckhard, *supra* note 130, at 682.

²⁹³ See Note, *supra* note 229, at 559-60.

²⁹⁴ 42 U.S.C. § 4332(2)(c) (1976).

²⁹⁵ S. REP. NO. 296, 91st Cong., 1st Sess., reprinted in 1969 U.S. CONG. & AD. NEWS 40416.

²⁹⁶ See *Vermont Yankee*, 435 U.S. 519 (1978).

²⁹⁷ Anderson, *supra* note 86, at 278.

102 of NEPA²⁹⁸ has been interpreted as providing²⁹⁹ a legal standard sufficient to prescribe agency action and violations thereof. Further evidence of the importance of these procedural elements is the statute's requirement of compliance "to the fullest extent possible."³⁰⁰ This provision suggests that the goals of requiring agency consideration of environmental consequences are only possible if the agencies faithfully adhere to the prescribed procedures.³⁰¹

Submission of a proper EIS by the agency is necessary to comply with the procedural mandates outlined in NEPA's Section 102(2)(c).³⁰² While courts have recognized that agencies cannot be held to the duty of submitting perfect EIS's,³⁰³ a proper EIS must present and evaluate all of the factors prescribed in Section 102(2)(c) in an analytical fashion.³⁰⁴ The EIS must contain discussion and analysis sufficient to allow for proper evaluation.³⁰⁵ In order to satisfy the "detailed statement" requirement of 102(2)(c),³⁰⁶ agencies must provide "sufficient detail to ensure that the agency has acted in good faith, made a full disclosure, and insured the integrity of the process."³⁰⁷ The statement must be comprehensive yet understandable and nonconclusory³⁰⁸ in its assessment of the consequences of the proposed action. Every significant aspect of the environmental impact of the proposed agency action must be weighed.³⁰⁹ In addition to providing a factual presentation, the EIS must also account for and include legitimate forecasts and discussion of potential alternatives, even those rejected by the agency in its internal analysis.³¹⁰

²⁹⁸ 42 U.S.C. § 4332 (1976).

²⁹⁹ See Kelly, *supra* note 214, at 89 (1982); see Leventhal, *supra* note 35, at 513.

³⁰⁰ Flint Ridge Dev. Co. v. Scenic River Ass'n, 426 U.S. 776, 787 (1976); Public Service Co. of New Hampshire v. Nuclear Regulatory Comm'n, 582 F.2d 77 (1st Cir. 1978).

³⁰¹ Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974).

³⁰² 42 U.S.C. § 4332(2)(c) (1976).

³⁰³ Environmental Defense Fund v. Corps of Engineers, 470 F.2d at 297.

³⁰⁴ 40 C.F.R. § 1502.2(a) (1983). For a discussion of whether analysis or simply description has become the foundation for the EIS, see CEQ Memoranda Summarizing Public Response to 1978 Regulations, at 5 (July 12, 1983). See also 48 Fed. Reg. 146, 34263-68 (1983).

³⁰⁵ County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1375 (2d Cir. 1975).

³⁰⁶ 42 U.S.C. § 4332(2)(c) (1976).

³⁰⁷ Commonwealth of Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979).

³⁰⁸ MCGREGOR, *supra* note 272, at 111.

³⁰⁹ Vermont Yankee, 435 U.S. at 519 (cited in New York v. Dept. of Transportation, 715 F.2d at 754 (Oakes, J., dissenting)).

³¹⁰ Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068 (1st Cir. 1980).

2. Alternatives

The requirement of agency evaluation of alternatives³¹¹ to the proposal is considered the "heart of the environmental impact statement."³¹² This element of the EIS has been termed the "linchpin"³¹³ of the NEPA procedural mandate and requires a thorough study and detailed discussion of alternatives to the proposed agency action.³¹⁴ While there is a consensus as to the importance of this portion of the EIS,³¹⁵ the "concept of 'alternatives' is an evolving one."³¹⁶ A thorough, good faith compliance with the alternatives assessment requirement is crucial to an informed agency decision regarding the best manner in which to achieve the agency goal.³¹⁷

Analysis of alternatives to the proposed agency action is controlled by the "rule of reason."³¹⁸ Judge Leventhal, in stating the case regarding the consideration of Section 102(2)(c)(iii) alternatives, posed the current³¹⁹ standard as "reasonableness."³²⁰ An EIS should be of sufficient depth to provide the agency with a sound basis for a reasoned decision,³²¹ and must include: 1) discussion of a "no-action" alternative;³²² 2) an evaluation of different methods of achieving the objective sought by the agency outside the jurisdiction of the agency preparing the EIS;³²³ and 3) methods of partial satisfaction of the agency goal with less detrimental

³¹¹ NEPA has two alternatives requirements: §§ 102(2)(C)(iii) and 102(2)(E). An interpretation of the distinction between the two sections is posed in *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123 (5th Cir. 1974). Section 102(2)(E) is triggered even when § 102(2)(C)(iii) is not.

Clearly § 102(2)(E) is supplemental to and more extensive in its command than the requirements of 102(2)(C)(iii). It was intended to emphasize an important part of NEPA's theme that all change was not progress and to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action *New York v. Dept. of Transportation*, 715 F.2d at 742.

³¹² 40 C.F.R. § 1502.14 (1983).

³¹³ *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).

³¹⁴ See *Grazing Fields Farm*, 626 F.2d 1068.

³¹⁵ 40 C.F.R. § 1502.14 (1983).

³¹⁶ *Vermont Yankee*, 435 U.S. at 551.

³¹⁷ *Commonwealth of Massachusetts v. Watt*, 716 F.2d at 953.

³¹⁸ See *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Grazing Fields*, 626 F.2d 1068; *Vermont Yankee*, 435 U.S. at 551-55.

³¹⁹ See *Lesser*, *supra* note 134, at 375; *Natural Resources Defense Council v. Calloway*, 524 F.2d 79 (2d Cir. 1975).

³²⁰ See *Leventhal*, *supra* note 35, at 520-21.

³²¹ *NRDC v. Morton*, 458 F.2d at 836.

³²² 458 F.2d at 834.

³²³ *Id.* at 834-35.

environmental consequences.³²⁴ The policy underlying this requirement is that a decision-maker confronted with a range of reasonable choices should be afforded the opportunity to achieve the agency objective and at the same time comply with the mandate of NEPA.³²⁵

The degree to which any particular alternative should be discussed in an EIS or considered at all by the agency is dependent upon the surrounding circumstances.³²⁶ The agencies themselves are initially responsible for determining the range of alternatives considered appropriate to the project,³²⁷ and to be included in the EIS. The agency's duty to discuss alternatives is not clearly defined in the statute; therefore, the agencies themselves must weigh the reasonableness of the various options to the proposed action.

In *Commonwealth of Massachusetts v. Watt*,³²⁸ the First Circuit stated that the reasonableness of proposed alternatives should be determined "by how much the likely environmental harm will be reduced"³²⁹ by another selection. In contrast, the Second Circuit imposes a higher standard on agencies to consider alternatives to the proposed action. In *City of New York v. United States Department of Transportation*,³³⁰ the Second Circuit employed a risk assessment analysis in concluding that the transportation of toxic substances is an action with potential environmental consequences.³³¹ The court held that the DOT was not required to assess the movement of toxic substances by a barge as an alternative because the agency was charged with responsibility of creating national regulations for highway transportation.³³² The court found the analysis of alternatives dependent upon the mission of the agency.³³³ According to the court, the agency's statutory mandate determines the scope of alternatives the agency

³²⁴ *Id.* at 856.

³²⁵ Lesser, *supra* note 134, at 379.

³²⁶ *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 436 (5th Cir. 1981).

³²⁷ *North Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.D.C. 1980).

³²⁸ 716 F.2d 946.

³²⁹ *Id.* at 949.

³³⁰ 715 F.2d 732 (2d Cir. 1983).

³³¹ *Id.* at 744.

³³² *Id.*

³³³ *Id.* at 743. This is reminiscent of Leventhal's discussion of imposing duties regarding the environment upon agencies with no avowed environmentally-based mission. See Leventhal, *supra* note 35, at 515.

was required to review.³³⁴ Both of these standards require a balancing of the public interest against consideration of the agency purpose³³⁵ and the project feasibility.³³⁶

In the recent case of *Friends of the River v. Federal Energy Regulatory Commission*,³³⁷ however, the D.C. Circuit adopted a standard according far more deference to the administrative agency in determining the alternatives which an agency is required to consider.³³⁸ The court accepted the agency presentation of alternatives as within the bounds of administrative particularity.³³⁹ While the court found that the agency should have considered the alternative of purchasing power to its proposal rooted in power generation,³⁴⁰ the court did not review the agency methods of surveying alternatives. It simply accepted the alternative as appropriate to a NEPA analysis because they had found so in a case three years prior to the instant case.³⁴¹ The court directed its attention to the issue of recording agency considerations of alternatives in the EIS itself.³⁴² Finding that FERC's failure to present the power purchasing alternative in the EIS clearly contravened the mandates of NEPA,³⁴³ the court still decided that a remand was unnecessary:³⁴⁴ "the EIS . . . is not an end in itself but rather a means toward the goal of better decision-making."³⁴⁵ The deferential stance of the court in *Friends of the River* allowed the majority to find agency consideration of alternatives adequate although not presented in the EIS.³⁴⁶ In the opinion of the court, therefore, a remand would not "meaningfully serve NEPA's goals."³⁴⁷

Although the focal point of much prior litigation,³⁴⁸ the adequacy of the EIS remains subject to case by case analysis. As illustrated by the disparate judicial treatment of the alternative

³³⁴ "The scope of alternatives to be considered is a function of how narrowly or broadly one views the objective of an agency's proposed action." 715 F.2d at 743.

³³⁵ See discussion *supra* text and notes at notes 148-151.

³³⁶ *Vermont Yankee*, 435 U.S. at 551.

³³⁷ 720 F.2d 93 (D.C. Cir. 1983).

³³⁸ *Id.* at 110.

³³⁹ *Id.* at 105.

³⁴⁰ *Id.*

³⁴¹ *Swinomish Tribal Community v. Federal Energy Regulatory Comm'n*, 627 F.2d 499, 514-15 (D.C. Cir. 1980).

³⁴² 720 F.2d at 105-09; See *Grazing Fields Farm*, 626 F.2d at 1068.

³⁴³ 720 F.2d at 106.

³⁴⁴ *Id.*

³⁴⁵ *Id.*, quoting *North Slope Borough v. Andrus*, 642 F.2d at 599-600 (D.C. Cir. 1980).

³⁴⁶ 720 F.2d at 106.

³⁴⁷ *Id.*

³⁴⁸ "Trends in NEPA Litigation," ENVIRONMENTAL QUALITY 1982 *supra* note 17 at 235.

assessment requirement, a consistent "common law of NEPA" has yet to develop in this particular area. Any effort to provide a consistent standard in evaluating the requirements of NEPA must originate with the judiciary in their assessment of the duties of federal agencies to comply with the policies underlying the statute. Efforts to develop a standard of federal government "accountability"³⁴⁹ for the environment by infusing environmental concerns into the agency decision-making process can only be fully achieved through requiring an agency to evaluate alternatives to its proposed action. Thus, the decision-maker is presented with a "clear basis for choice among options."³⁵⁰ Federal agencies must be required to provide a thorough discussion of the "reasonable alternatives"³⁵¹ within the EIS itself if such a document is to have any influence on the agency's selection of a final course of action.³⁵² Proper consideration of alternatives provides a manner of accomplishing Congress' goal of promoting environmentally sensible agency decision making.

While courts have taken inconsistent views of the required contents of an EIS, this inconsistency has been compounded by confusion over the basis for judicial review of agency compliance with the EIS requirements. NEPA prescribes the procedural elements of the EIS process. Yet, upon judicial review, the EIS does not always reflect proper agency compliance with the statute.³⁵³ If the requirements of Section 102 are observed in good faith by an agency, the substantive goals of NEPA will become effective. Without a clear judicial standard for compliance with the EIS, however, the danger exists that agencies will circumvent these requirements and undermine the goal of NEPA. The agency as trustee will fail in its duty to account for the trust property management to the beneficiaries.³⁵⁴

V. EIS VS. THE ADMINISTRATIVE RECORD: WHICH CONSTITUTES THE BASIS OF JUDICIAL REVIEW?

Presentation of the alternatives considered by the trustee in selecting the method best suited to fulfill the goals of the settlor

³⁴⁹ S. REP. NO. 94-52, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS, 859, 865.

³⁵⁰ 40 C.F.R. § 1502.14 (1983).

³⁵¹ *Id.*

³⁵² *See generally*, Leventhal, *supra* note 35; Natural Resources Defense Council v. Morton, 858 F.2d 827 (D.C. Cir. 1972); Kelly, *supra* note 214; Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068.

³⁵³ *See supra* text and notes at notes 250-265.

³⁵⁴ *See supra* text and notes at notes 107-115.

and the needs of the beneficiaries is inherent in the accounting process.³⁵⁵ Similarly, under Section 102(2)(c) of NEPA, agencies must consider reasonable alternatives to proposed federal action.³⁵⁶ In evaluating the sufficiency of an agency's consideration of alternatives in an EIS, a reviewing court must employ the "rule of reason" standard³⁵⁷ in reviewing the adequacy of the EIS. The First Circuit, in *Grazing Fields Farm v. Goldschmidt*, viewed the administrative record as the standard by which to judge the adequacy of the discussion of alternatives in the EIS itself.³⁵⁸

In an effort to avoid post hoc rationalizations by agencies,³⁵⁹ NEPA established the requirement of an EIS which should encapsulate the factors in the agency decision-making process. Agency considerations of alternatives to the proposed plan pursuant to Section 102(2)(c)(iii) must be summarized in the EIS.³⁶⁰ Evidence of a particular alternative's infeasibility may be ascertained through review of the administrative record when not included in the EIS for that reason,³⁶¹ but the administrative record cannot supplant the EIS in the estimation of the First Circuit.

A question now exists about whether the precedent established by the First Circuit in *Grazing Fields Farm* mandates that a full discussion of reasonable alternatives to a proposal for major federal agency action be contained or incorporated by reference within the EIS itself in order to achieve successful compliance with Section 102(2)(c) of NEPA. The status of *Grazing Fields Farm v. Goldschmidt* as precedent for the mandate of a self-contained, sufficient discussion of alternatives within the Environmental Impact Statement has been eroded by subsequent judicial interpretations of the EIS requirement.

An important element of *Grazing Fields Farm* was the First Circuit's attempt to refine the somewhat amorphous parameters of judicial responsibility under NEPA regarding the judicial eval-

³⁵⁵ See *supra* text and notes at notes 104, 110.

³⁵⁶ 720 F.2d at 106; 626 F.2d at 1074; *Natural Resources Defense Council v. Morton*, 458 F.2d at 834.

³⁵⁷ This standard of review is adopted by the First Circuit in *Commonwealth of Massachusetts v. Andrus*, 594 F.2d at 884; see also 626 F.2d at 1074; 720 F.2d at 120 (Bazelon, C.J., dissenting).

³⁵⁸ 626 F.2d at 1073; see also *I-291 Why? Association v. Burns*, 517 F.2d at 1081.

³⁵⁹ 720 F.2d at 106.

³⁶⁰ 42 U.S.C. § 4332(2)(c)(iii) (1976); 40 C.F.R. § 1502.14; see also *Grazing Fields Farm*, 626 F.2d 1068.

³⁶¹ 626 F.2d at 1074.

uation of the sufficiency of EIS compliance by a federal agency.³⁶²

The First Circuit attempted to set forth the standards of judicial review of agency discretion, and, despite the widely accepted validity of this attempt, the result is often contrary to the environmental goals imposed by NEPA.³⁶³ Consequently, the primary focus of the *Grazing Fields Farm* decision addressed the relationship of the administrative record prepared by the agency for its own decision-making purposes to the EIS prepared pursuant to the NEPA dictate.³⁶⁴

The Fifth Circuit in *Piedmont Heights Civil Club, Inc. v. Moreland*,³⁶⁵ distinguished *Grazing Fields Farm* by limiting an inappropriate administrative record to that which has not been incorporated into the EIS. The court found that reports not included in, nor circulated with the EIS were sufficient to satisfy NEPA if simply referred to in the EIS and made available to public comment.³⁶⁶ In addition, *Wade v. Lewis*,³⁶⁷ decided in the Seventh Circuit, held that a supplemental administrative record adequately satisfied the EIS requirements in spite of the piecemeal presentation of a basis upon which to evaluate the environmental consequences of highway construction.³⁶⁸ Like *Grazing Fields Farm*, both these cases concern the development of highways; and if read jointly, they could tarnish the relatively unscarred precedential value of *Grazing Fields Farm* on the subject of the adequacy of EIS discussion of alternatives and therefore the adequacy of the EIS itself.

It is possible that the recent decision of the D.C. Circuit in *Friends of the River v. Federal Energy Regulatory Commission*³⁶⁹ may severely undermine the precedential value of *Grazing Fields Farm*³⁷⁰ by allowing an EIS violation to remain without remedy through application of a low threshold-balancing analysis.³⁷¹ The

³⁶² 626 F.2d 1072; see also 435 U.S. 558 (1978).

³⁶³ Leventhal, *supra* note 35, at 515.

³⁶⁴ 626 F.2d at 1073-74.

³⁶⁵ 637 F.2d 430 (5th Cir. 1981).

³⁶⁶ *Id.* at 438.

³⁶⁷ 561 F. Supp. 913 (N.D. Ill. 1983).

³⁶⁸ *Id.* at 948 (The court here uses the arbitrary and capricious standard of review on the issue of alternatives as addressed in the EIS).

³⁶⁹ 720 F.2d 93.

³⁷⁰ 626 F.2d at 1068.

³⁷¹ 720 F.2d at 106 (Judge Ginzburg, writing for the majority, while emphasizing the import of the NEPA procedural mandate essentially indicates that the observance of the specified EIS procedures would not assist here in the accomplishment of NEPA's goals).

D.C. Circuit in *Friends of the River* developed a position contrary to that of the First Circuit in *Grazing Fields Farm v. Goldschmidt* regarding the substantiation required for agency study of alternatives as required by Section 102(2)(c) of NEPA. As a result, the self-contained discussion of reasonable alternatives to an agency proposal previously limited to presentation in the EIS,³⁷² may now be interpreted to expand to the entire administrative record.

Friends of the River is the most recent case to address the issue of the administrative record as a legitimate supplement to an EIS discussion of alternatives to the major federal agency action.³⁷³ While not a case involving highway construction, and therefore distinguishable from *Grazing Fields Farm*,³⁷⁴ *Friends of the River* has the potential to undermine the more liberal holding of the First Circuit. Considered the pre-eminent judicial forum for administrative law,³⁷⁵ the D.C. Circuit, in *Friends of the River*, displayed the utmost deference to FERC in affirming the agency's licensing of a hydroelectric plant despite noncompliance with the procedural mandate of NEPA.³⁷⁶ Employing a balancing analysis, the court held that a remand would serve "no sensible purpose" notwithstanding the agency's failure to discuss the purchase of power as a viable alternative.³⁷⁷ Citing *Kleppe v. Sierra Club*,³⁷⁸ the court allowed the determination regarding the filing of an EIS as "properly left to the informed discretion"³⁷⁹ of the agency.³⁸⁰

The majority opinion in *Friends of the River*, delivered by Judge Ginzburg, accepted the plaintiff's view that FERC had not considered a legitimate alternative within the EIS itself.³⁸¹ However, the reasoning offered for the court's view of power purchasing as

³⁷² See 626 F.2d at 1072-74 ("(Even) . . . Congress has specified the procedural means appropriate to vindicate the substantive goals of NEPA. Section 4332(2)(c) . . . orders the agency to prepare a detailed statement discussing the environmental issues." *Id.* at 1072).

³⁷³ 720 F.2d at 93.

³⁷⁴ Segmentation analysis is the title given analysis of the impact of highway construction on the environment at various points along the proposed route.

³⁷⁵ See Wenner, *supra* note 149, at 103.

³⁷⁶ 720 F.2d at 106.

³⁷⁷ See 40 C.F.R. § 1505.2(b) (1983); *Calvert Cliffs'*, 449 F.2d at 1115 (Judge Wright interpreted the NEPA mandate to require a finely tuned and systematic balancing analysis as necessary to achievement of the statutory goal, see also *Richland Park Homeowners Ass'n, Inc. v. Pierce*, 671 F.2d 935 (5th Cir. 1982).)

³⁷⁸ 427 U.S. 390 (1976).

³⁷⁹ 720 F.2d at 104 n.21.

³⁸⁰ *Id.* at 412.

³⁸¹ 720 F.2d at 106.

an alternative deserving of discussion in the EIS rests solely upon the assertion that once before the court had accepted purchased power as an alternative within NEPA and therefore would do so again.³⁸² This analysis does not suggest an effort of serious evaluation of the alternative in light of the project goals and the agency mission.³⁸³

The court, in a discussion of agency decision-making, compared the "substantial evidence"³⁸⁴ required of an agency decision to be demonstrated throughout the record with the NEPA mandate of a single integrated document, the EIS.³⁸⁵ While not explicitly distinguishing *Grazing Fields Farm*, the court virtually ignored the substantive import of the First Circuit opinion in determining that although FERC clearly did not comply with the required Section 102(2)(c) alternatives discussion, there was no justification for a remand. Remand was considered unnecessary due to the court's confidence, upon review of the administrative record, that FERC had given due consideration to the relevant environmental factors³⁸⁶ and had performed this obligation in an "accessible, intelligible form."³⁸⁷

The court insisted that a remand due to the deficiency in the EIS would jeopardize NEPA's "lofty declarations"³⁸⁸ in requiring

³⁸² 720 F.2d at 105.

³⁸³ See *City of New York v. United States Department of Transportation*, 715 F.2d 732 (2d Cir. 1983). McChesney, *Vermont Yankee Revisited: High Court Upholds NRC's S-3 Table for Second Time*, 13 ENVTL L. REP. (ENVTL L. INST.) 10239 (8/83). One of these three cases overturned by the Supreme Court was the *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, in which Justice O'Connor reversed Judge Bazelon for the second time in the ten year saga of the *Vermont Yankee* litigation. It is conceivable that the D.C. Circuit wishes to maintain its position as the arbiter of administrative law decisions and consequently, the validity of their decisions; an end possibly achieved through a more conservative approach to environmental issues and deference to federal agencies. It is possible that the Circuit Court, acknowledged as more sophisticated in administrative law analysis than most courts, has departed from its usually more rigorous analysis in the wake of the *Vermont Yankee* experience. In the ten years of litigation and administrative procedures involved in the *Vermont Yankee* case, the Supreme Court has twice reversed Judge Bazelon of the District of Columbia Circuit as to the applicable interpretation of NEPA; more precisely, what is required of an EIS. As the first decision to address a NEPA issue since the June, 1983 Supreme Court decision in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, the D.C. Circuit may be more concerned with trying to protect its credibility as the arbiter of administrative law issues rather than paying due respect to the substance of NEPA.

³⁸⁴ 720 F.2d at 105-06.

³⁸⁵ *Id.* at 106.

³⁸⁶ *Id.* at 108.

³⁸⁷ *Id.*, notes 32-33.

³⁸⁸ *Id.* at 108.

further action from the agency which had essentially complied with NEPA. Such compliance was found by the court upon review of the administrative record, not the EIS itself. In doing so the majority ignored the reasoning of *Grazing Fields Farm*, in which the importance of the circulation and public comment of the EIS is stressed³⁸⁹ in recognition of the accountability element of that procedure. Unlike the EIS, an administrative record is not circulated to the public, thereby avoiding exposure of agency decision making.³⁹⁰

The majority opinion discussed the absence in the administrative record of any post hoc rationalizations on the part of FERC. FERC made a good faith attempt to fulfill the NEPA policy, if not the procedural goals.³⁹¹ In essence, the majority appears to be applying the "substantial evidence" evaluation of the record employed in administrative law under the Administrative Procedure Act,³⁹² while allegedly involved in an analysis of NEPA and its procedural mechanism, the EIS.³⁹³ While citing *Grazing Fields Farm*,³⁹⁴ the court does not address the First Circuit's reasoning regarding the necessity of a self-contained discussion of alternatives within the EIS itself.³⁹⁵ Claiming to hold the Commission to a "strict standard of compliance,"³⁹⁶ the court essentially displayed great deference to the agency procedure.³⁹⁷

In contrast to the majority opinion, Judge Bazelon, in a strongly worded dissent, strictly construed the NEPA requirement of a "rigorous consideration of alternatives in a form which will facilitate public comment"³⁹⁸ to require FERC compliance with the statute.³⁹⁹ Alluding to "blatant statutory violations"⁴⁰⁰ on the part of FERC, Judge Bazelon took the position that unless strictly applied, the procedural mechanisms of NEPA will be flag-

³⁸⁹ See 626 F.2d at 1073; *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974).

³⁹⁰ 626 F.2d at 1074.

³⁹¹ 720 F.2d at 106-07.

³⁹² 5 U.S.C. § 557; see *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

³⁹³ 720 F.2d at 106.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 110.

³⁹⁷ *Id.* (The majority opinion is conclusory in its assessment of FERC compliance with the "concerns underlying NEPA" as justification for failure to comply with the statute's procedural mandate).

³⁹⁸ 40 C.F.R. § 1502.14(a) (1983); 720 F.2d at 120.

³⁹⁹ 720 F.2d at 124 (Bazelon, C.J., dissenting).

⁴⁰⁰ *Id.* at 123.

rantly ignored and in essence, emasculated.⁴⁰¹ The dissent noted the importance of public circulation and comment,⁴⁰² an analysis more consistent with that utilized by the First Circuit in *Grazing Fields Farm*. Judge Bazelon pays greater attention to the specific purposes of NEPA compliance as ultimately achieving the statutory policy goal than does the majority.

The result of the Bazelon approach is a far more coherent and statutorily based analysis than that engaged in by the majority. His view that the administrative record cannot cure the deficiencies of the EIS rested soundly upon the language of *Grazing Fields Farm*. According to Bazelon, to rob the EIS requirement of an appropriate discussion of alternatives within the statement itself would "undermine the very foundation of NEPA."⁴⁰³

VI. PROPOSED AMENDMENTS TO NEPA

NEPA is considered by some scholars as the "most decisive single piece of legislation in the field of environmental protection."⁴⁰⁴ Inconsistent construction of the Act among scholars, commentators, judges, and administrators, however, detracts from its effectiveness in achieving its goals of protecting the environment. To preserve and protect the nation's natural resources by infusing environmental considerations into the agency decision-making process requires an amendment to the statute. Judicial interpretation of NEPA has shaped the enforcement and implementation of the statute over the past fourteen years.⁴⁰⁵ Unless some effort is made to codify these standards into a uniform set of guidelines, however, the statute will never fully attain its purpose. Just as the Council of Environmental Quality drew from judicial construction of NEPA in preparing the implementing regulations for the statute, Congress should amend NEPA to incorporate the principles that have evolved through judicial interpretation.

NEPA should be amended to include more specific language

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 120 nn.102, 121.

⁴⁰³ *Id.* at 123.

⁴⁰⁴ ASSESSMENTS AND STATEMENTS, *supra* note 6, at 291. *But see contra* LAKE, *supra* note 10, at 93-94 (Lake views the Administrative Procedure Act as the foundation for the development of environmental law and as a more effective tool for litigation purposes than is NEPA).

⁴⁰⁵ *See supra* text and notes at notes 160-222.

regarding agency responsibilities under the Act. In its current form, the statute raises several ambiguities as to what procedural guidelines federal agencies must observe to comply with the mandate of the statute. The most important of these ambiguities involves the issue of the role of the EIS. The Act should explicitly describe the importance of the EIS as a comprehensive, integrated summary of the agency decision-making process. The EIS alone should be used to evaluate the degree of agency compliance with the procedural requirements of the statute.

Analysis of the EIS, however, cannot be effectively formulated unless the judiciary applies a consistent standard of review in evaluating agency compliance with the procedural mandates of NEPA. The statute should therefore be amended to provide a definitive standard of judicial review for evaluating agency compliance with the Act. The Clean Air Act Amendments of 1977⁴⁰⁶ provide a clear illustration of how the statutory amendment process may be used to formulate a consistent standard of judicial review. Congress amended the Clean Air Act to codify the standard of review that had evolved through the course of early litigation under the Act.⁴⁰⁷ Similarly, Congress should amend NEPA to include a reasonableness standard of judicial review for evaluating the adequacy of agency action under the statute. A synthesis of the past fourteen years of litigation is possible via statutory recognition of the high level of duty imposed upon federal agencies in a trustee capacity through judicial application of the "reasonableness" standard to agency decision making. Adoption of a reasonableness standard would clarify the responsibilities of federal agencies under the Act, and would eliminate much of the confusion created by the varying judicial views of the requirements imposed by NEPA.

Finally, the amendments to NEPA should redefine the role of the Council on Environmental Quality. Although the present Administration is loath to expand the role of federal bureaucracy, there is a clear need for a strong overseeing body to implement NEPA, as evidenced by the confusion and plethora of litigation during the past fourteen years over the meaning of the statute.

⁴⁰⁶ 42 U.S.C. §§ 7401-7642 (Supp. V, 1981).

⁴⁰⁷ The arbitrary and capricious standard of judicial review was expressly adopted in the 1977 Amendments to the Clean Air Act. This standard was selected over the substantial evidence standard by the conferees. 42 U.S.C. § 7607 (Supp. I, 1977). H.R. CONF. REP. NO. 564, 95th Cong., 1st Sess. 178 (1977) *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1559. *See* National Lime Association v. EPA, 627 F.2d 416, 452 (D.C. Cir. 1980).

Stronger administration of the procedural requirements of NEPA are necessary in order to fulfill the ultimate goal of NEPA — environmentally sensitive decision making by federal agencies. The CEQ could provide this guidance and ensure agency compliance with these requirements if it were imbued with more than vague, advisory powers.

In essence, NEPA should be drawn more narrowly to prevent federal agencies from manipulating and circumventing the statute through narrow-minded decision making. Congress should clarify the duties of federal agencies under NEPA and translate the statute's broad environmental policies into more precise procedural demands.

VII. CONCLUSION

NEPA shares many of the characteristics of a charitable trust. Like a trust instrument, the statute itself declares, as its trust purpose, the goal of preserving and protecting the quality of the American natural and physical environment. Congress, as the settlor empowered with the legal capacity to create the trust document, designated the federal government, through its agencies, to be the trustee of the environment for this purpose. The Act is intended to protect the present and future interests of the trust beneficiaries, the American citizens. It is incumbent upon federal agencies to fulfill their fiduciary duties as trustees owe to the beneficiaries in the conduct of any affairs affecting the environment. In addition to exercising the reasonable skill, prudence, care, and loyalty of a trustee, federal agencies must observe the trustee's obligation to account for the trust administration to the beneficiaries of the trust. To fulfill this accounting obligation, the federal agencies must observe the accounting requirements provided in the statute, the procedural mandates of the EIS provision.

Recognition of the federal agencies' duties as trustees of the environment provides the judiciary with a standard by which to ensure conscientious compliance with the principles outlined in the Act. Judicial interpretation of the statute's broad language is necessary to ensure that the protective goals of NEPA are fulfilled. In order for the judicial interpretation of NEPA to provide an effective standard for federal agencies to observe, judicial interpretation of the Act must be consistent. The analogy of NEPA to the charitable trust affords the courts the opportunity

to apply a consistent standard of analysis to issues raised under NEPA.

The principle of trustee accountability to the beneficiaries must not be undermined by inconsistent requirements regarding the recordkeeping of the trust administration. NEPA explicitly created the EIS as the procedural mechanism to implement the Act's goal of infusing environmental considerations into the federal agency decision-making process. NEPA requires that the EIS contain a complete explanation of the federal agency decision-making process. The EIS alone must satisfy the basic requirements of statutory compliance. While the administrative record compiled in the process of formulating proposed agency action is an important reference for the court in assessing the thorough compliance by the agency, the discussion of alternatives required under Section 102(2)(c)(iii) of NEPA must be sufficiently presented in the EIS.

Finally, judicial review of issues arising under NEPA must be conducted under a consistent approach. The trustee is conferred with certain duties and a standard of conduct in the exercise of his discretion regarding the treatment of the trust property. The trustee's activities and decisions should be evaluated under a standard of reasonable care. Consequently, judicial evaluation of the federal agency compliance with the procedural mandates of NEPA should be based upon a "reasonableness" standard requiring a standard of agency behavior commensurate with its trustee-like role under the Act. In light of the underlying purpose of NEPA — to entrust the quality of the present and future environment of the United States to the good faith judgment of the federal agencies — a high standard of integrity is appropriate. Consistent application of such a standard would provide federal agencies with a guideline for complying with NEPA and judicial analysis would be far less contrived. Under such an ascertainable structure, both the judicial and the administrative branches of the federal government would ensure that the American public, as beneficiaries of the trust, is provided with a qualitatively acceptable natural environment.